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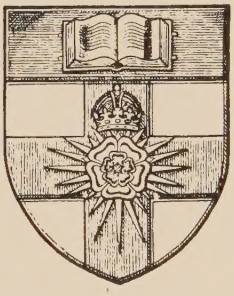

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VOL. XIII.

1883–84.—XLVII & XLVIII VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

XLVIII VICTORIÆ.

WILKINSON AND OTHERS *v.* COLLYER.

1884
March 31.

Landlord and Tenant—Covenant to pay "all Rates, Taxes, and Assessments"—Metropolis Local Management Acts, 1855 *and* 1862 (18 *&* 19 *Vict. c.* 120, s. 105, *and* 25 *&* 26 *Vict. c.* 102, s. 96).

By an agreement of lease the tenant agreed to pay "all rates, taxes, and assessments payable in respect of the premises during the term:"—

Held, that a sum assessed upon the owners as their proportion of the expense of paving the street upon which the premises abutted, was not a rate, tax, or assessment within the meaning of the covenant, but a charge imposed upon the owner for the permanent improvement of his property.

THE writ was specially indorsed as follows:—

"The plaintiffs claim is as landlords of a house known as Gothic Lodge, Rye Hill Park, Peckham, against the defendant as tenant thereof under them, for 26*l.* 17*s.*

"The defendant, by an agreement for lease of the said house, dated the 25th October, 1882, and made between the plaintiffs

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and the defendant, agreed to pay all rates, taxes, and assessments payable in respect of the premises during the tenancy (except land-tax and the landlord's property tax).

"The sum claimed is the amount apportioned by the vestry of St. Giles, Camberwell, in respect of the premises, of paving the said street called Rye Hill Park. The plaintiffs applied to the defendant to pay this sum, but he refused, and the plaintiffs were compelled to pay and did pay the said sum.

"Particulars.

"Amount paid to the vestry of St. Giles, Camberwell, towards cost of paving, as per receipt, 26*l.* 17*s.*"

The defendant in his statement of defence admitted that he was tenant to the plaintiffs as stated in the above indorsement (there being no statement of claim), and that the lease contained a clause in these terms,—"The tenant agrees to pay all rates, taxes, and assessments payable in respect of the premises during the tenancy (except the land-tax and the landlords' property-tax);" but he denied his liability under the above clause to pay the apportionment in question.

A. T. Lawrence, moved for judgment for the plaintiffs upon the admissions on the pleadings. The sum claimed is a sum "payable in respect of the premises," within the covenant whereby the tenant agreed to pay "all rates, taxes, and *assessments* payable in respect of the premises during the tenancy." No doubt, the apportionment for paving, channelling, and sewering new streets is by the statutes made a charge upon the owners of the premises (see the Metropolis Local Management Acts, 1855 and 1862, 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 96); but it is a sum payable "in respect of the premises," against which the defendant covenanted to indemnify the plaintiffs. In *Thompson* v. *Lapworth* (1), the lessee covenanted that he would during the continuance of the term pay and discharge "all taxes, rates, duties, and assessments whatsoever which during the continuance of the demise should be taxed, assessed, or imposed on the tenant or landlord of the premises demised in respect thereof;" and it was held that the sum assessed by the

(1) Law Rep. 3 C. P. 149.

vestry as the proportion of the estimated expense of paving the street payable by the owner in respect of the premises was a "duty" or "assessment" assessed or imposed upon the lessor in respect of the premises, within the covenant. *Hartley* v. *Hudson* (1) and *Budd* v. *Marshall* (2) are to the same effect. In *Allum* v. *Dickinson* (3) the sum in question was held to be a charge upon the *owner* in respect of the premises, and therefore the Court of Appeal held that the lessee was not bound by his covenant to recoup the lessor. Here, the assessment clearly was one against which it was contemplated that the landlord should be indemnified by the tenant.

Pelham, for the defendant, submitted that the language of the covenant excluded liability on the part of the tenant in respect of a charge like this, which was not a recurring charge, but one imposed by the Metropolis Local Management Acts upon the owners in respect of the permanent improvement of their property. He relied upon *Allum* v. *Dickinson* (3); and also upon *Tidswell* v. *Whitworth* (4), cited and approved of in *Hartley* v. *Hudson*. (1)

[MANISTY, J. *Hartley* v. *Hudson* (1) turned very much upon the word "charged" in the covenant.]

A. T. Lawrence in reply.

MANISTY, J. This case is not free from difficulty; but I think that, when the facts are ascertained, the difficulty in a great degree vanishes. The claim is by the plaintiffs as landlords against the defendant as tenant of a house at Peckham held by him at a yearly rent of 38*l*. By an agreement for lease for three years from the 25th of October, 1882, the tenant agreed to pay "all rates, taxes, and assessments payable in respect of the premises during the tenancy, except land-tax and the landlords' property-tax." The sum claimed (26*l*. 17*s*.) is the amount apportioned by the vestry of St. Giles, Camberwell, in respect of the premises demised, of the expense of paving the street upon which the house abuts. The defendant admits the tenancy under the agreement: but he says that by the Metropolis Local Management Acts, 1855 and 1862, the amount apportioned in this case

(1) 4 C. P. D. 367.
(2) 5 C. P. D. 481.
(3) 9 Q. B. D. 632.
(4) Law Rep. 2 C. P. 326.

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Manisty, J.

is payable by the plaintiffs as owners of the premises, and is not a "rate, tax, or assessment payable in respect of the premises," which he the defendant has by his covenant undertaken to pay. To arrive at a correct conclusion we must see what are the words of the Acts of Parliament in question. Now, s. 105 of 18 & 19 Vict. c. 120 enacts that, "in case the owners of houses forming the greater part of any new street laid out or made or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish in which such street is situate, be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same shall be so paved, then and in either of such cases such vestry or board shall make and effectually pave the same, &c., and from time to time keep such pavement in good and sufficient repair; and the *owners* of the houses forming such street shall on demand pay to such vestry or board the amount of the actual expenses of providing and laying such pavement, such amount to be determined by the surveyor for the time being of the vestry or board." And s. 96 of 25 & 26 Vict. c. 102 enacts that "it shall be lawful for any vestry or district board, at their discretion, to require payment of any costs or expenses which the *owner* of any premises may be liable to pay under the recited Act (18 & 19 Vict. c. 120) or this Act, either from the *owner* or from *any person who then* or at any time thereafter *occupies* such premises, and such *owner* or occupier shall be liable to pay the same, and the same shall be recovered in manner authorized by the recited Act and this Act; and the *owner* shall allow such occupier to deduct the sum of money which he so pays out of the rent from time to time becoming due in respect of the said premises as if the same had been actually paid to such owner as part of such rent. . . . Provided always that nothing herein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay or discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatever between landlord and tenant." That raises the question whether the expenses of paving the street in question, which were payable by the

owners, though recoverable from the occupier, were a sum payable in respect of the premises from which the tenant had agreed to indemnify his landlords. It certainly is not a "rate" or a "tax," but a sum incurred by the vestry for improving the property of the owners of the premises: and, unless there is some authority to the contrary, I should hold the words here used to apply to rates and assessments of a temporary or recurring nature, and not to a sum which is a charge upon the property giving it an increased permanent value. But the question is whether the defendant has by his covenant taken upon himself this extraordinary liability. The cases seem to shew the desire of the Courts not to impose such a liability upon the tenant unless compelled by express words or by necessary implication to do so. We were much pressed with the case of *Budd* v. *Marshall* (1), decided in the Court of Appeal in the year 1880; and, if that case is in point, it is binding upon us, and we must act upon it. There the tenant covenanted to "bear, pay, and discharge the land-tax (if any), sewers rate, borough rate, improvement rate, tithes and tithe rent-charge in lieu of tithes, and all other taxes, rates, *duties and assessments* whatsoever, whether parliamentary, parochial, or otherwise, which then were or which at any time or times thereafter during the term should be taxed, charged, rated, assessed, or imposed on the said premises or any part thereof, or upon the landlords or tenant in respect thereof, or in respect of the yearly rent," except income-tax on rent. The drainage having become defective, the sanitary authority of the borough caused a notice to be served upon the plaintiffs requiring them as owners to abate the nuisance, and, the notice not having been complied with, obtained an order from a justice to the like effect. The plaintiffs, having executed the works necessary to enable them to obey the order, sought to recover the cost of them from the defendant under his covenant: and it was held by the majority of the Court that the action was maintainable. And why? Because the covenant contained the word "duties." Brett, L.J., thought the tenant was not liable. But Bramwell, L.J., puts it thus:—"The rights of the parties must be governed by the covenant. A great many words have been used

(1) 5 C. P. D. 481.

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apparently with the intention of including every possible case that may arise. The tenant is to bear, pay, and discharge all 'taxes, rates, duties, assessments.' Why should not that include the duty of making good the defective drainage? Why should not the tenant bear the cost? I cannot give an answer to this which is satisfactory to myself. It has been said that this covenant is applicable only to rates and taxes, and charges of a similar kind. I think that a sufficient answer to that is to be found in the circumstance that the word 'duties' itself is used. It is said that the covenant is applicable only to charges which are recurrent in their nature: but it extends to improvement rates, which are not of that description. It has been said, why should not this expense be borne by the landlord? but the question is whether words sufficiently wide have been used to cast the burden upon the tenant. I am at a loss to see what other words can be put in. It seems to me that the parties intended to specify every kind of disbursement which they could think of. Suppose that the local authority were to do the work in the first instance, could it be contended that in that case there would not be a 'duty' cast upon the landlord which the tenant would be bound to discharge by force of this covenant? Will it not be strange if the landlord cannot recover it from the tenant because he has himself done what was necessary? In other words, will it not be unreasonable if the liability depends upon the circumstance whether the local authority itself has done the work?" "As to the cases, it is extremely difficult to take them into account: but, so far as they go, I think them in favour of the construction which I adopt. In *Tidswell* v. *Whitworth* (1) the words were 'tax, rate, assessment, or imposition;' and these are not so wide as those of the present case. But, in *Thompson* v. *Lapworth* (2), decided in the following year, it was held that the tenant had bound himself to pay a similar charge by force of the words 'taxes, rates, duties, and assessments.' Two other cases of a similar nature have been cited, which were decided before Lindley, J.,—*Rawlins* v. *Briggs* (3) and *Hartley* v. *Hudson* (4): the former was decided upon the authority of *Tidswell* v. *Whit-*

(1) Law Rep. 2 C. P. 326.
(2) Law Rep. 3 C. P. 149.
(3) 3 C. P. D. 368.
(4) 4 C. P. D. 367.

worth (1); but the latter is very much in favour of the view taken by me." Baggallay, L.J., took the same view. "The terms of the covenant which we have now under consideration," he says, "are at least as comprehensive as were those in *Thompson* v. *Lapworth* (2); and, whether the decision in *Tidswell* v. *Whitworth* (1) is one which can or cannot be defended upon the ground of its special circumstances, it is to my mind clear that the judges who decided it in favour of the tenant must have decided the present case in favour of the landlord, if they adhered to the views expressed by them in *Thompson* v. *Lapworth* (2)." He then goes through all the authorities down to *Hartley* v. *Hudson* (3), founding his judgment mainly upon the word "charged." In the year 1882 there came the case of *Allum* v. *Dickinson* (4), which goes a long way to support the view which I am taking. There, the lessee of a house in a new street within the metropolitan district, for seven, fourteen, or twenty-one years, covenanted with his lessor to pay "all rates and assessments rated, charged, assessed, or imposed upon the demised premises or upon the occupier or tenant in respect thereof:" and it was held that the proportion of the expense of paving the new street assessed upon the demised premises under the Acts was not a rate payable by the tenant under this covenant. Jessel, M.R. (5), says that the assessment in question "is not a charge on the occupier; it is a charge on the owner, with a remedy against the occupier," under s. 96 of the Act of 1862. And Lindley, L.J., says: "It is plain that when the statute is looked at the payment is not within one part of the covenant, that is, it is not charged or imposed on the premises. But, is it charged or imposed upon the occupier or tenant in respect of the premises? I am of opinion that that is not the true construction of the section. I think that it is imposed upon the landlord, although power is given to recover it against the occupier." That was a decision of the Court of Appeal. The case of *Hartley* v. *Hudson* (3), in 1879, is not unimportant. It was there held, that, under a covenant to pay and discharge "all rates, taxes, charges, and assessments whatsoever which now are

(1) Law Rep. 2 C. P. 326.
(2) Law Rep. 3 C. P. 149.
(3) 4 C. P. D. 367.
(4) 9 Q. B. D. 632.
(5) At p. 635.

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or may be charged or assessed upon the premises or upon any person or persons in respect thereof," the tenant was liable to repay to the landlord the amount which he had been compelled to pay to the sanitary authority in respect of certain sewerage and paving works executed by them under the provisions of the Public Health Acts, after failure by him to obey an order of a justice to that effect. It was held to be a "charge" upon the premises, but not a "rate, tax, or assessment." No case has gone the length of holding that a sum assessed upon the owner as his proportion of the expense of paving a new street, is a rate, tax, or assessment within such a covenant as this. I therefore think our judgment should be for the defendant.

WILLIAMS, J. I am of the same opinion. Whether or not the plaintiffs can recover from the defendant the 27*l.* 16*s.* which they claim in this action, depends upon whether or not the covenant into which the defendant has entered includes an apportionment, under the Metropolis Local Management Acts, 1855 and 1862, of paving the street upon which the premises in question abut. The covenant is as follows:—"The tenant agrees to pay all rates, taxes, and assessments payable in respect of the premises during the tenancy, except the land-tax and the landlord's property-tax." If this is a rate, tax, or assessment payable in respect of the premises, no matter by whom, the covenant covers it. But, looking at the language, I think it clearly was not the meaning and intention of the parties that the tenant should pay the expense incurred by the parish authorities in paving the street. I can quite understand that different words should induce judges to arrive at different conclusions upon covenants of a similar nature: and, without regard to the seemingly conflicting authorities which have been cited, I content myself with saying that in my opinion the words "rates, taxes, and assessments" do not fairly bear the meaning contended for on the part of the plaintiffs. I rest my judgment upon the dictum of Lindley, J., in *Hartley* v. *Hudson* (1). I also think that *Tidswell* v. *Whitworth* (2) really covers the ground. This is not a question of mere words: it is a question of substance.

(1) 4 C. P. D. 367. (2) Law Rep. 2 C. P. 326.

Seeing that the term was for three years only, and the annual rent of the premises but 38*l.*, I cannot think the parties could have contemplated that such a burthen as this should be imposed upon the tenant. I agree with my Brother Manisty that there must be judgment for the defendant, with costs: but I think the plaintiffs should have a stay of execution to enable them to appeal, if so advised.

Judgment for the defendant.

Solicitors for plaintiffs: *Harries, Wilkinson, & Raikes.*

Solicitor for defendant: *F. F. Payne.*

J. S.

THE BURIAL BOARD FOR PADDINGTON, MIDDLESEX, APPELLANTS; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

March 14.

Revenue—Income Tax—Burial Board—Application of Surplus Income in aid of Poor-rate—"Profit"—5 & 6 Vict. c. 35, s. 60; 15 & 16 Vict. c. 85, s. 22.

A burial board was constituted under 15 & 16 Vict. c. 85, and in pursuance of the Act a burial ground was provided with money charged upon the poor-rate of the parish, and the surplus over expenditure of the income derived from the fees charged by the board was regularly applied in aid of the poor-rate:—

Held, that the board were liable to be assessed to the income tax in respect of such surplus, inasmuch as the provision requiring it to be applied in aid of the poor-rate did not prevent it from being a "profit" within 5 & 6 Vict. c. 35, s. 60.

CASE stated under 43 & 44 Vict. c. 19.

1. This was an appeal by the Burial Board for Paddington, Middlesex, against a decision of the Commissioners of Income Tax confirming an assessment upon the board of income tax for the year commencing the 6th of April, 1879, in respect of the alleged annual profits of the board.

2. The board was duly formed on the 15th of July, 1853, under and in accordance with the powers conferred by 15 & 16 Vict. c. 85, an Act to amend the laws concerning the Burial of the Dead in the Metropolis.

3. A sum of 16,600*l.* which was required for the purposes of the act by the board was, in pursuance of the powers given by ss. 20 and 21 of the Act, borrowed by the board from the Public Works Loan Commissioners upon the security of the poor rates of the parish of Paddington.

4. This loan was repayable by instalments; part of the loan and

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PADDINGTON BURIAL BOARD v. COMMISSIONERS OF INLAND REVENUE.

of the interest thereon, amounting in the whole to 8610*l.* 4*s.* 4*d.*, was repaid by the vestry of Paddington, and the balance was repaid by the board. The last instalment was paid off on the 1st of July, 1870.

5. The money received by the board, and which constitutes the sole source of income of the board, is derived from payments made in accordance with a fixed scale of charges under s. 34 of the Act for interments in the burial ground provided for the parish and for other matters connected therewith, as shewn in the printed list annexed to the case.

7. Since 1870, all surplus money at the disposal of the board has in each year been paid to the overseers of Paddington in accordance with the Act 15 & 16 Vict. c. 85, s. 22 (1), and has been applied by them in aid of the poor-rate of the parish.

8. The average annual amount of the surplus money at the disposal of the board for the three years ending the 31st of March, 1879, was 2544*l.* 3*s.* 2*d.* The board was assessed for income tax for the year commencing the 6th of April, 1879, upon the sum of 2544*l.* 3*s.* 2*d.*, and appealed from such assessment to the Income Tax Commissioners.

9. On behalf of the board, it was contended before the Income Tax Commissioners that the yearly surplus money in the hands of the board is not profit or gains within the meaning of the Income Tax Acts, as it is by 15 & 16 Vict. c. 85, s. 22, directed to be, and was in fact, applied in aid of the poor-rate of the parish, and that the surplus money was not liable to be assessed for income tax.

(1) 15 & 16 Vict. c. 85, s. 22: The money raised for defraying such expenses and the income arising from the burial ground provided for the parish except fees payable to the incumbent, &c., shall be applied by the board in or towards the expenses of such board under this Act, and whenever, after repayment of all monies borrowed for the purposes of this Act in or for any parish, and the interest thereof, and after satisfying all liabilities of the board with reference to the execution of this Act in or for the parish, and providing such a balance as shall be deemed by the board sufficient to meet their probable liabilities during the then next year there shall be at the time of the holding the meeting of the vestry at which the yearly report of the auditors shall be produced, any surplus money at the disposal of the board they shall pay the same to the overseers in aid of the rate for the relief of the poor in the parish.

10. The surveyor of taxes, on behalf of the Crown, contended that the surplus above mentioned was assessable under the Income Tax Acts, because it was the balance of profit remaining to the board after certain transactions, namely, the burial of the dead, were concluded; and submitted that the disposal or expenditure of profits does not fall within the purview of the Income Tax Acts. The surveyor further contended that the burial of the dead as carried on by the Paddington Burial Board is a trading transaction, inasmuch as that board, for a monetary consideration, is prepared to bury and does bury any person, whether resident in the parish or not, whose representatives are prepared to pay the charge made by the board for such interment, and submitted that any portion of such payment to the board remaining unexpended when the actual cost to the board of such interment had been met is profit within the meaning of the Income Tax Acts, and assessable accordingly.

11. The Commissioners were of opinion that the board was properly chargeable with income tax on the sum of 2544*l.* 3*s.* 2*d.*, and confirmed the assessment.

A. Charles, Q.C. (*T. Northmore Lawrence*, and *Peile*, with him), for the appellants. The surplus income of the burial board is not a gain or profit within 5 & 6 Vict. c. 35, s. 60. Under 15 & 16 Vict. c. 85, ss. 19, 22, the cost of providing and maintaining burial grounds is charged primarily upon the poor-rate, and the receipts, if any, of the burial boards are to be applied in discharge of this liability. It must be conceded that if a profit can be made out of the receipts of the burial board, the destination of this profit, so far as taxation is concerned, is immaterial, but where the surplus receipts are intercepted by the express provisions of an Act of Parliament they never become a profit in the hands of the burial board. Here the surplus proceeds are held in trust for the ratepayers of the parish. In *Glasgow Water Commissioners* v. *Solicitor of Inland Revenue* (1), approved by the House of Lords in *Mersey Docks* v. *Lucas* (2), the Commissioners were charged under schedule D.

(1) 2 Scotch Sess. Cas. 708. (2) 8 App. Cas. 891.

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of 5 & 6 Vict. c. 35. The Commissioners were empowered by local Act to supply water and to levy compulsory water rates within the municipal boundary, and also to supply water to the inhabitants of an outlying district if they chose to take it at fixed rates. The whole amount of these rates was applicable to the expenses of the undertaking, and the surplus in any year was to go in reduction of the domestic water rates of the following year. It was held that the surplus, after paying expenses, was not assessable as profit, on the ground that the statutory arrangement by which the excess of revenue was appropriated shewed that it could not be regarded as income or profit. So here, if the charges for burial are more than sufficient to cover expenses, the surplus is applied by statute for the benefit of the poor-rate. The effect of the provisions as to the expenses of the burial ground is that the poor-rate supplies the money in the first instance. For the purpose of repaying the poor-rate the board are allowed in their discretion to levy rates upon such ratepayers as use the ground, and if the rates are so high that there is a surplus at the end of the year this is paid back to the general rate. The ratepayers are to be at liberty to advance the money and to secure its repayment by the agency of a burial board elected by themselves, who take fees from individual ratepayers using the ground with the object of exonerating the general rates.

Sir H. James, *A.G.*, and *A. V. Dicey*, for the respondents, were not heard.

DAY, J. I am clearly of opinion that this appeal must be dismissed. In my view it is immaterial to consider how the fund for establishing this burial-ground was provided. The parish, with the sanction of the legislature, have established a burial-ground where the dead bodies both of ratepayers and other persons are buried upon payment of fees, and from the income so derived there is in every year a surplus after payment of all expenses. It is true that by the terms of 15 & 16 Vict. c. 85, the burial board are merely trustees of this surplus for the benefit of the parish, and are not allowed to appropriate it to their own purposes. It is applied in aid and in reduction of the poor-rate,

which would otherwise be levied upon the individual ratepayers. The board in fact, carry on a business for the benefit of the ratepayers of the parish.

It has been urged that the present case should be governed by the principles laid down in *Glasgow Water Commissioners* v. *Solicitor of Inland Revenue.* (1) If I may say so without disrespect, I entirely concur with the judgments of the Lord President and Lord Deas in that case. I think that there can be no doubt that the inhabitants of Glasgow (using this expression to distinguish them from those outside the district to which the compulsory powers applied) did not carry on the business of supplying water within the municipal boundaries of Glasgow. The scheme of the local Act was this. Rates were granted in respect of an estimated deficiency in the income from water-rates to meet the expenses of procuring it, and it was provided that whenever the income exceeded the expenses and the rates were therefore excessive, the surplus should be carried on to the next year. This was merely a convenient means of always having a fund in hand to meet expenses, leaving the question of whether too much had been raised in any one year to be decided when the accounts were made up. Profit in any sense of the term was neither contemplated nor provided for. It was meant that the ratepayers should pay no more for the water than it actually cost, and profit was wholly excluded from the scheme. This is an entirely different case. Here the parish practically carry on the business of burying the dead for the benefit of the parish. They may with the sanction of the Home Secretary charge what fees they please, and there is nothing to prevent their income exceeding their expenditure year after year, and however large this surplus may be they are bound to apply it in reduction of the burthen upon the ratepayers.

I entirely agree with the observation that we need not trouble ourselves about the destination of the profits. As soon as profits are shewn to exist the income tax attaches. Then it is said that this money is applied to a charitable purpose. But there is no more charity in it than in any other business which people carry

(1) 2 Scotch Sess. Cas. 708.

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on for their own profit and advantage. It is a fortunate speculation which the parish is quite justified in entering upon, but they cannot make their profit without contributing to the public burthens in the same way as other persons.

SMITH, J. I am of the same opinion. The question to be decided is whether the board is a concern carrying on trade for profit. We have been referred to the different sections of 15 & 16 Vict. c. 85, by which the expenses of the board are in the first instance to come out of the poor-rate, and they are empowered to charge fees subject to the control, by a later Act, of the Secretary of State. The result is that the board carry on a business, and in that business there is an excess of income over expenditure. Is this excess "profit" within the meaning of the Income Tax Act? I think that it is. The case of *Glasgow Corporation Water Commissioners* v. *Solicitor of Inland Revenue* (1), to which we have been referred, is distinguishable. There the scheme of the local Act was that the corporation were never to make any profit at all. In this case the burial board are entitled to charge any fees they think proper, and in the course of their business they make a profit. When once you have the fact that a profit is made, it is taxable under the Income Tax Act, and since the case of *Mersey Docks* v. *Lucas* (2), it must be taken to be wholly immaterial what is the destination of such profit—whether it is appropriated to the benefit of one or more persons, or retained for the benefit of the person who makes it.

Judgment for the respondents.

Solicitor for appellants: *J. H. Hortin.*
Solicitor for respondents: *Solicitor for Inland Revenue.*

(1) 2 Scotch Sess. Cas. 708. (2) 8 App. Cas. 891.

A. P. S.

[IN THE COURT OF APPEAL.]

1884
May 2.

THE QUEEN, ON THE PROSECUTION OF THE GUARDIANS OF HIGH WYCOMBE, RESPONDENTS *v.* THE GUARDIANS OF MARYLEBONE, APPELLANTS.

Poor Law—Derivative Settlement—Divided Parishes Act, 1876 (39 & 40 *Vict.* c. 61), *s.* 35.

Under the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), an illegitimate child under sixteen does not take the settlement of its mother, where such settlement has been derived from the mother's father, but such child is remitted to its birth settlement.

CASE stated on an appeal to quarter sessions from an order of justices for the county of Bucks, for the removal of Thomas William Wilmot, otherwise Beale, and Sidney Wilmot, otherwise Beale (hereinafter called the paupers), the illegitimate children of Emily Louisa Beale, to the parish of St. Mary, Marylebone, as the place of their last legal settlement. The court of quarter sessions confirmed this order.

At the hearing the following facts were proved or admitted:—

Emily Louisa Beale was born in the year 1857 at Hoxton, in the parish of Shoreditch, in the county of Middlesex, and had never done anything to acquire any other settlement for herself.

William Beale, the father of Emily Louisa Beale, after her birth and while she was under the age of sixteen years, acquired a settlement by occupation of a tenement and payment of rates in the parish of Bermondsey in the county of Surrey.

The paupers were respectively born at Homer Street, in the parish of St. Marylebone, in the county of Middlesex, in the years 1877 and 1879, and were the illegitimate children of Emily Louisa Beale.

The paupers had been deserted by their mother in and had become chargeable to the Wycombe Union.

The respondents contended that by virtue of s. 35 of 39 & 40 Vict. c. 61, the paupers were settled in the parish of St. Marylebone, being the parish in which they were respectively born.

The appellants contended that on the true construction of the

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section the paupers were settled in the parish of Hoxton, being the parish of the birth of their mother, and that the order of removal to the parish of St. Marylebone was therefore wrong.

The court of quarter sessions were of opinion that the contention of the respondents was right, and affirmed the order with costs.

1883. June 12. *Bompas*, Q.C. (*Lumley* with him), for the respondents.

Vesey Fitzgerald (*Poland* with him), for the appellants.

Cur. adv. vult.

1883. July 10. The judgment of the Court (Williams and Smith, JJ.) was read by—

WILLIAMS, J. This was an appeal by the guardians of the parish of Marylebone to the quarter sessions of the county of Bucks against an order of removal, dated the 25th of August, 1882, of two pauper children named Thomas William Wilmot, otherwise Beale, and Sidney Wilmot, otherwise Beale, the illegitimate children of Emily Louisa Beale, from the union of Wycombe to the parish of Marylebone.

The quarter sessions confirmed the order of the justices, subject to the opinion of this Court upon a special case.

The special case was argued before my brother Smith and myself during the present sittings, and I now proceed to give the judgment, in the result of which he concurs. The facts are as follows:—

Emily Louisa Beale, the mother of the paupers, was born in 1857, in the parish of Shoreditch, and had never done anything to acquire any other settlement for herself; her father, William Beale, after her birth and while she was a child under sixteen, acquired a settlement by occupation of a tenement and payment of rates in the parish of Bermondsey.

The two pauper children were born in the parish of Marylebone, in the years 1877 and 1879 respectively, and were the illegitimate children of Emily Louisa Beale.

The two children had been deserted by their mother in the

union of Wycombe, and had become chargeable to that union, and the order of the 25th of August, 1882, which is the subject of this appeal, directed their removal to the parish of Marylebone, the place where they were born.

Upon these facts the appellants contended that the proper settlement of the paupers was the parish of Shoreditch, being the birth settlement of their mother, or at any rate that they were not shewn to be settled in Marylebone; their contention being that since the abolition of derivative settlements by the Divided Parishes Act, 1878 (39 & 40 Vict. c. 61, s. 35), the mother's true settlement was her birth settlement, and that consequently the children derived her settlement in Shoreditch.

The respondents on the other hand contended that upon the above facts it could not be shewn what settlement the paupers derived from their parent without inquiries into the derivative settlement of such parent, and that consequently by the provisions of the Act the children must be deemed to be settled in Marylebone, where they were born. The language of s. 35 of 39 & 40 Vict. c. 61, is as follows: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned, shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

The question turns upon the true construction of this section. If it had not been for conflicting decisions and opinions upon the question I should have thought it clear that the order appealed against was correct upon the short grounds: First, that the

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mother's settlement was Bermondsey, being her derivative settlement from her father; Second, that it could not be shewn what settlement the children derived from her without inquiry into that derivative settlement, and therefore, in the words of the statute, that the children must be deemed to be settled in Marylebone where they were born.

This appears to have been the decision of Lush and Manisty, JJ., in the case of *Overseers of Manchester* v. *Guardians of St. Pancras* (1), but a contrary interpretation seems to have been given to the section by Lindley and Mathew, JJ., in *Guardians of Hollingbourn* v. *Guardians of West Ham* (2), and lastly, we have the Master of the Rolls sitting with Cotton and Bowen L.JJ., in the most recent case upon the subject, declaring that the section is unintelligible, and that he cannot and does not pretend to understand it, and that he is unable to see a case to which the third part of the section applies. (3) In this state of conflict of opinion it becomes necessary carefully and minutely to examine the facts of the case in relation to every word of the section which is applicable to them.

In the first place the paupers are children, they are illegitimate, they are under sixteen, they were born in Marylebone, and have not acquired a settlement for themselves, the mother, who has deserted them in the union of Wycombe, was born in Shoreditch in 1857, and while she was under sixteen and before the recent Act came into operation derived her father's acquired settlement in Bermondsey, and has done nothing to acquire another. Such are the facts, and I now turn first to the second part of the section which deals expressly with illegitimate children, and this says: "An illegitimate child shall retain the settlement of its mother until such child acquires another settlement." This language, if we had to go no further, is plain and unequivocal, but if it is to be read in connection with the rest of the section it gives rise upon the facts before us to a series of further questions. The first is, what is the mother's settlement? Is it her derivative settlement in Bermondsey? or is this abolished by the Act? and is she remitted to her birth settlement in Shore-

(1) 4 Q. B. D. 409. (2) 6 Q. B. D. 580.
(3) *The Queen* v. *Guardians of Bridgnorth*, 11 Q. B. D. 314.

ditch? Secondly, if she retains her derivative settlement, then does the third part of the section apply so as to throw the children back upon their birth settlement? or do they retain the settlement of the mother as directed by the second part of the section? or do they take her birth settlement? To begin with the first of these questions, we must turn to the language of the first part of the section, which declares that "no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father . . . up to that age, and shall retain the settlement so taken until it shall acquire another." The first point that arises here is whether the words "no person" at the commencement of the section are to be read simply without any qualification? or are they by the context limited to persons who are paupers and whose settlement is under consideration? The latter is the opinion expressed by Brett, L.J., in *Reg.* v. *Guardians of Bridgnorth.* (1) If this be correct then, of course, the mother, not being a person whose settlement as a pauper is under consideration, retained her derivative settlement, and we might at once proceed to consider the further questions; but I will assume for a moment, what I do not concede, that the section includes all persons; then the further question must be answered whether the mother comes within the exception of the case of a child under the age of sixteen which is to take the settlement of its father up to that age and retain the settlement so taken until it acquires another? This point was decided in 1878 by Cockburn, C.J., and Manisty, J., in *Great Yarmouth* v. *City of London.* (2) In that case the question was as to the settlement of Hannah, wife of James Fisk, who was born in 1843 at Great Yarmouth. James Fisk never acquired a settlement in his own right. His father George Fisk, while the son James was under sixteen, acquired a settlement in Gorleston. In 1877 Hannah, the pauper, the wife of James, became chargeable to the city of London, and an order of justices was made adjudging her to be legally settled in Great Yarmouth as her husband's birth settlement, this order was appealed against and quashed, the Court adjudging that James

(1) 11 Q. B. D. 314; 52 L. J. (M.C.) 71. (2) 3 Q. B. D. 232.

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Fisk's true settlement was his derivative one from his father, upon the ground that he came within the exception in s. 35 of a child under sixteen who took and retained the settlement of his father until he acquired another, which he never did. Upon principle, therefore, as well as authority we are of opinion that Emily Louisa Beale, the mother, retained her derivative settlement, upon the ground that she was within the exception of a child under sixteen who took and retained her father's acquired settlement in Bermondsey. The further question now arises, does the third part of the section apply to the case, and if so what is the effect of it? In dealing with this question the first point that presents itself is whether illegitimate children come within the description "any child in this section mentioned." It seems to me clear that they do, illegitimate children are expressly mentioned in the section, and there is nothing in the context so far as I can see to limit the expression "any child," and this was so decided by Lush and Manisty, JJ., in the case of *Guardians of Manchester* v. *Guardians of St. Pancras.* (1) We next come to a question which if it had not been doubted I should have thought equally plain, namely, whether illegitimate children can be referred to in the section when it speaks of children deriving a settlement from their parent, in other words, whether illegitimate children ever take a derivative settlement. This point is, I believe, really involved in the decision last referred to, but I think it will be best to consider how the case of illegitimate children stands. Before the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76, s. 71), the liability to relieve illegitimate paupers fell upon their place of birth, which therefore was their place of settlement, with this qualification, that during the age of nurture such children could not be separated from the mother, and the liability to relieve them fell by accident, as it were, upon the place of the mother's settlement. In this state of the law difficulties arose as to the exact time when the mother and child could be separated and removed to different places. The 71st section of the Poor Law Amendment Act in order to settle these difficulties enacted that "Every child which shall be born a bastard after the passing of this Act shall have and follow the

(1) 4 Q. B. D. 409.

settlement of the mother of such child until such child shall attain the age of sixteen or shall acquire a settlement in its own right." Upon this section it was decided by Lord Campbell and the Court of Queen's Bench in 1853, in *St. Andrews* v. *Bodenham* (1), that the place of settlement of an illegitimate pauper over the age of sixteen who had acquired no settlement of his own was the place of his birth and not the settlement of his mother. Then came the present statute, which enacts that "an illegitimate child shall retain the settlement of its mother until such child acquires another settlement." It seems to me, therefore, strictly correct to say that an illegitimate child is a child that derives or may derive a settlement from its parent.

Lastly, we come to the question whether the final provision of the third part of the section is applicable to the case, and, if so, what is the effect of it. The words are, "If . . . it cannot be shewn what settlement such child derived from the parent without inquiring into the derivative settlement of such parent, such child shall be deemed to be settled in the parish in which he was born." Lindley and Mathew, JJ., in the case of *Guardians of Hollingbourn* v. *Guardians of West Ham* (2), considered that this part of the section did not apply to cases that came within the plain words of the first part of the section relating to legitimate children with their widowed mother, and therefore presumably not to the case of illegitimate children dealt with by the second part of the section; but in opposition to this is the decision of Lush and Manisty, JJ., in *Overseers of Manchester* v. *Overseers of St. Pancras.* (3) In that case the mother of an illegitimate pauper had married and derived a settlement from her husband, and it was decided that upon the true construction of this section the pauper child took neither the birth settlement nor derivative settlement of its mother, but that it was settled in the place of its birth. The same thing was again decided in the case of the *Fulham Union* v. *Portsea Union* (4), by Pollock, B., and Manisty, J. The difficulty of interpretation in this conflict of opinion is not lessened by the declarations of the Lords Justices in the present year, in the case already referred to, with all the above authorities before them, that the whole section was unintelligible.

(1) 1 E. & B. 465.
(2) 6 Q. B. D. 580.
(3) 4 Q. B. D. 409.
(4) 7 Q. B. D. 384.

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Under these circumstances it is impossible to speak with any confidence as to the proper interpretation of the Act, but the best judgment we can form after very full and careful consideration is that this third part of the section is applicable to the case of illegitimate children whose mother has derived a settlement from her father, and that as soon as this appears, then the contingency has arisen which is referred to in the Act, namely, that it cannot be shewn what settlement such children derived from the parent without inquiring into the derivative settlement of such parent, and that the consequence expressly provided for by the Act immediately follows, namely, that the children shall be deemed to be settled in the place where they were born.

Taking, then, the section as a whole, I interpret it as follows: That in considering the immediate question of the settlement of a pauper, as a general rule no pauper is to be deemed to have derived a settlement from another person. From this general rule there are excepted the cases of married women who are still to derive their settlements from their husbands, and children under sixteen, and illegitimate children who are to derive and retain the settlements of their parents. The legislature then proceeds to recur to this general rule by making an exception upon the exception, and declaring that, so far as pauper children are concerned, they shall not derive a derivative settlement from their parents; but in cases where the parent's settlement itself is a derivative one, the children shall be sent to the place of their own birth, and in such case shall derive no settlement from their parent at all.

Order of quarter sessions confirmed.

A. M.

The appellants appealed.

1884. May 2. *Poland*, and *Vesey Fitzgerald*, for the appellants. Before 39 & 40 Vict. c. 61, the paupers would have gone to Bermondsey, the settlement of their mother's father, and it is now contended that no inquiry can be made beyond the settlement of the mother, and that her illegitimate children must take her settlement. *Woodstock Union* v. *St. Pancras* (1) is not binding upon this Court, and the facts in *Reg.* v. *Bridgnorth* (2)

(1) 4 Q. B. D. 1. (2) 11 Q. B. D. 314.

are distinguishable: moreover, in these cases the question of illegitimacy was not raised. *Reg.* v. *Guardians of Hereford Union* (1) is in favour of the appellants.

Bompas, Q.C., and *Lumley*, for the respondents, were not called upon to argue.

BRETT, M.R. I cannot say that the point to be determined by us is clear; but I think that I understand the construction of the statute sufficiently to be able to say that the judgment of the Queen's Bench Division was right. It is not necessary to determine what is the meaning of the second clause of 39 & 40 Vict. c. 61, s. 35; whatever its true construction may be, we must pass over it for the purposes of the present case. It is the third clause which is material to our decision: if this enactment were not in existence, the paupers would have taken the settlement of their mother, that being in Bermondsey; but the mother's settlement was derivative; for it is impossible to suppose that she could have two settlements, and therefore she took that which her father had acquired. But the enactment forbids inquiry into the derivative settlement of the mother, and it applies to illegitimate as well as legitimate children: that one point is clear. The enactment assumes that some inquiry must take place as to the settlement of the parent; but it seems to me to land that inquiry in an absurdity, because it cannot be ascertained what settlement a child derives from his parent without inquiry into the settlement of the parent, and if that settlement of the parent turns out to have been derivative, the cost of the inquiry is thrown away. An illegitimate child is to retain the settlement of his mother until he acquires another settlement. The inquiry must be extended so as to ascertain whether she has gained a settlement of her own, and if she has not the child must be deemed to be settled in the parish in which he was born. Notwithstanding the somewhat incongruous result of this construction of the statute, I think it correct; and in the present case so soon as it is ascertained that the mother of the paupers had a derivative settlement, that settlement must be thrown out of the question. This mode of viewing the question makes the judgment of the Queen's Bench Division correct.

(1) 43 J. P. 335.

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BOWEN, L.J. I agree with the Master of the Rolls that the construction of the statute is a matter of difficulty; but I think that I understand the question submitted to us sufficiently to enable me to give judgment without further argument. The first clause of s. 35 of 39 & 40 Vict. c. 61, destroys derivative settlements with certain exceptions which do not apply to illegitimate children. The second clause deals with illegitimate children; and if we were to stop here, the settlement of the mother would be the settlement of the paupers; but we need not stop to inquire what is the exact construction of the second clause, for it is the third clause which decides this case: the effect of it may be stated to be that if the mother's settlement cannot be shewn without inquiring into what is her derivative settlement, the Court shall not go into that question for the purpose of proving the settlement of the child. The place of the child's birth is to be taken, and it is not to be displaced by that which is really a fiction.

FRY, L.J. I cannot put any other construction upon 39 & 40 Vict. c. 61, s. 39, than that which has been adopted by the other members of this Court and by the Queen's Bench Division. The first clause abolishes derivative settlements, with certain exceptions, which do not extend to illegitimate children; the second clause enacts that "an illegitimate child shall retain the settlement of its mother until such child acquires another settlement;" it in effect provides for an inquiry, for it must be asked and ascertained what is the place of settlement of the mother. The third clause applies to illegitimate as well as legitimate children; it provides that "if any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." Under these words not only is inquiry as to the mother's settlement allowed, but it must take place; it is, however, only necessary to inquire whether the mother's settlement is or is not derivative: so soon as it is ascertained that it is derivative, the inquiry need be carried no further, for in this case the settlement of the mother is displaced by the

birth-place of the child. The result of the enactment is that an illegitimate child is to take the settlement of his mother, if that settlement is not derivative; but if it is derivative he must be deemed to be settled in the parish where he was born.

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Appeal dismissed.

Solicitors for appellants: *Clarkson, Greenwell, & Wyles.*
Solicitors for respondents: *Lovell, Son, & Pitfield.*

J. E. H.

[IN THE COURT OF APPEAL.]

May 17.

DINNING, APPELLANT; THE GUARDIANS OF THE SOUTH SHIELDS UNION, RESPONDENTS.

Poor Law—Maintenance of Married Woman—Order upon Husband towards Cost of Relief—31 & 32 *Vict. c.* 122, *s.* 33.

It is not a condition precedent to the power of justices under 31 & 32 Vict. c. 122, s. 33, to order the husband to pay for the maintenance of his pauper wife, that the guardians should have fixed the sum for her relief. Therefore, although the guardians have not fixed any sum for her future relief, but have given her a small weekly sum, the justices may under the 33rd section order the husband to pay for her maintenance such weekly sum as, considering the condition of the husband and all the circumstances, may be proper, although it may exceed the amount of the relief previously given to her by the guardians.

Decision of the Queen's Bench Division (12 Q. B. D. 61) reversed.

APPEAL by the guardians of the South Shields Union from a decision of the Queen's Bench Division (1) on a special case stated by the justices.

The facts were shortly these:—Thomas Dinning was summoned at the instance of the guardians under s. 33 of the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122) (2), to shew cause why an order should not be made on him to pay a weekly sum

(1) 12 Q. B. D. 61.

(2) 31 & 32 Vict. c. 122, s. 33, enacts, "Where a married woman requires relief without her husband the guardians of the union or parish, or the overseers of the parish, as the case may be, to which she becomes chargeable may apply to the justices having jurisdiction in such union or parish in petty sessions assembled, and thereupon such justices may summon such husband to appear before them to shew cause why an order should not be made upon him to maintain his wife; and upon his appearance, or in the event of his non-

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towards the relief of his wife, Elizabeth Dinning, who had become chargeable to the South Shields Poor Law Union.

It was proved that the said Elizabeth was Thomas Dinning's wife, that she had become chargeable, and that he had sufficient means to maintain her, and also that the amount of relief which the guardians had granted to the said Elizabeth was the sum of 3*s.* a week, and no more. The justices ordered Thomas Dinning to pay 15*s.* weekly to the relieving officer towards the relief and maintenance of his wife, and the question stated in the case for the opinion of the Court was whether such order was valid.

The Queen's Bench Division (Stephen and Mathew, JJ., Lord Coleridge, C.J., dissenting) quashed the order of the justices.

The guardians appealed.

A. Wills, Q.C. (*Cock* with him), for the appellants. The amount of relief which has been given by the guardians to the pauper has no bearing on the matter. That relates only to the past, and cannot affect an order which may be made on the husband under this 33rd section for the future relief of his wife.

[BRETT, M.R. Is it a condition precedent to the justices making an order under such section that the guardians should have fixed a sum for relief?]

No, there is nothing in the enactment to shew that there should be any such condition precedent.

[He was then stopped.]

Charles, Q.C., and *Bremner*, for the respondent. The guardians are the only proper persons to fix what shall be the amount of poor law relief to be given, and the 33rd section limits the power

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appearing, upon proof of due service of such summons upon him, such justices may, after hearing such wife upon oath or receiving such other evidence as they may deem sufficient, make an order upon him to pay such sum weekly or otherwise towards the cost of the relief of the wife as after consideration of all the circumstances of the case shall appear to them to be proper, and shall determine in such order how and to whom the payments shall from time to time be made, which order shall if the payments required by it to be made be in arrear, be enforced in the manner prescribed by the Act 11 & 12 Vict. c. 43, for the enforcing of orders of justices requiring the payment of a sum of money: Provided that such order may be at any future time revoked by the justices in petty sessions assembled, if they see sufficient cause for so doing."

of the justices to ordering the husband to pay a sum "towards the cost" of such relief. The intention of the legislature is only to indemnify the guardians, and through them the ratepayers, against the relief they pay the pauper. Here the only relief given has been to the extent of 3*s.* a week.

BRETT, M.R. I am of opinion that under this 33rd section of the Act the justices would not be entitled to make an order on the husband to allow the wife a sum which would be in the shape or nature of alimony. The duty of the justices acting under this enactment is to consider what is the proper amount of relief to be given to the wife treated as a pauper, and then to consider the condition of the husband and all the circumstances of the case which have relevancy to that question, and to make an order on the husband to pay the whole of that amount, or if in their opinion he is not able to pay the whole, then such part as in their opinion he can pay towards that relief. If the justices were to make an order in the nature of giving the wife alimony they would be exceeding their jurisdiction, but the special case which has been stated does not raise that point, and the objection to the order made is not that in making it they were so exceeding their jurisdiction, but that they had no authority to order the relief which they ordered for the wife as a pauper because the guardians had only given her relief to the extent of 3*s.* a week, or because the guardians had not previously fixed the amount to be allowed to the pauper, and therefore the power of the justices to make an order on the husband for payment was confined to an order which did not exceed the amount which had been so given. As however the order asked for of the justices under the Act is one entirely as to the future, it seems to me that it cannot be limited to what has been done for the past, and the only question then is, whether it is a condition precedent that before such order is made the guardians should have fixed the sum for relief. To ascertain this, I must construe the enactment by the ordinary rules of construction. There are no express words in the section making the fixing the sum by the guardians a condition precedent, and it is impossible I think to say that it is made so by necessary implication, because the husband, who is

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able to pay for the maintenance of his wife, casts the burden of doing so on the union, and the guardians objecting to bear the whole of such expense go to the justices to fix what is the proper sum the husband should pay. It is therefore not true that this is a condition precedent to the justices making the order on the husband; but if it is not true, then as it is the only ground which has been suggested why the order cannot be made, it follows, in my opinion, that the justices were entitled to make the order which they made.

BOWEN, L.J. I am of the same opinion. I do not think that it is a condition precedent to the order being made by the justices that a sum should be fixed by the guardians for the future relief of the wife. Mr. Charles endeavoured to argue that it is such a condition precedent because of the words in the section "towards the cost of the relief of the wife," and he said that you must construe those words as meaning the cost when an order for relief has been actually made. I do not, however, think that that is their true construction. The section is in aid of parochial relief, and it begins by saying "when a married woman requires relief," and then empowers the guardians to apply to the justices for an order on the husband "to maintain his wife," and it means that the justices may order him to pay such sum as may be proper for him to pay for the relief of his wife, not such as should be given by way of alimony, but such as should be given for the maintenance of a pauper.

FRY, L.J. I am of the same opinion. It is evident to me that the legislature in passing this enactment had not in view the ordering a payment by the husband of a sum already fixed, and therefore I am of opinion that it is not a condition precedent to the justices making the order that the amount of relief should previously have been determined by the guardians.

Appeal allowed.

Solicitors for appellants: *Iliffe, Russell, Iliffe, & Cardale, for Mabam & Graham, South Shields.*

Solicitor for respondent: *J. S. Coleman, for J. G. Bentham, Sunderland.*

W. P.

[CROWN CASE RESERVED.]

1884
May 10.

THE QUEEN *v.* DE BANKS.

Criminal Law—Larceny—Bailment of Money—Larceny by Bailee.

A prisoner was convicted of larceny under the following circumstances:—The prosecutor gave a mare of his into the care of the prisoner, telling him that it was to be sold on the next Wednesday. On the next Wednesday the prosecutor did not go himself to sell his mare, but sent his wife, who went to where the prisoner was and saw him riding the mare about a horse fair, and sell her to a third party, and receive on such sale some money. The prosecutor's wife after such sale asked the prisoner to give her the money, saying she would pay his expenses, this the prisoner declined to do, and eventually he absconded with the money and without accounting:—

Held, by the Court (Lord Coleridge, C.J., Grove, Field, and Smith, JJ., Stephen, J., dissenting) that there was evidence that the prisoner was a bailee of the money thus paid to him, and that the conviction could be supported.

THE following case was stated by the deputy-chairman of the quarter sessions for the county of Salop.

"The evidence, so far as it is material to the point reserved, was as follows:—"Joseph Suker, the prosecutor, proved—'On Friday the 11th of January I drove a chestnut mare into Chester with prisoner. I left her at Mr. Wild's, a butcher. I engaged the prisoner to look after her. I said to him 'Do the mare well, and I will be here on Wednesday morning and will pay you for your work.' He was to have charge of her till I came. I told him to pay for the keep till I came. I meant him to look after her altogether. I should not have objected to his doing anything else. On Saturday, the 12th of January, I saw prisoner, I asked him how the mare looked, and he said she was as lame as a cat; he said he had removed her to his father's house. I said I should be at Chester by the first train. I told him the mare should be sold on the Wednesday morning when I went, as she would not do for me. I sent my wife on that morning. I have never received a farthing from prisoner on account of the mare.

"Annie Suker, wife of prosecutor, proved—'I went on Wednesday, the 16th of January. I saw prisoner in the street. I asked him if he had sold the mare; he said he had not. I went with

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him to Wild's stables. Saw mare taken out of the stables into the street. Prisoner was riding the mare about the fair. Mr. Foster bought her. Prisoner, Mr. Foster, and Arthan went to the *Queen's Head* together. I was outside the door and watched. I saw Foster give prisoner some money. Prisoner came out and shewed me a cheque. He did not give it me. He said he would go to the bank and get it cashed. I asked him for it several times but he would not part. He told me he had sold the mare for 13*l.* He came out of the bank and said they would not cash him the cheque. I asked him to give it to me and said I would pay his expenses. He would not do so. I said he must come with me to Whitchurch, and I must have either the money or the mare. I had great difficulty in getting him to the station. At Whitchurch, when we got to the gas works, he bolted down a little alley which leads to the canal. I ran after him and called, but he did not answer. I have never received any money for the mare.'

"Joseph Arthan proved sale of chestnut mare by prisoner to Foster, and payment of 15*l.* to prisoner.

"Robert Thomas, sergeant of police, proved that prisoner absconded from Whitchurch on the 18th of January; prisoner was arrested at Chester on the 31st of January.

"I held there was no evidence to go to the jury of the defendant's employment as a servant so as to make him guilty of embezzlement. It was then contended on behalf of the defendant that there was no evidence of the larceny of 15*l.* I left the case to the jury, who found 'that the prisoner had authority to sell the mare and converted the money to his own use,' and a verdict of 'guilty of larceny' was recorded.

"The question reserved for the opinion of the Court is whether there was any evidence of larceny which could properly be left to the jury."

No counsel appeared.

LORD COLERIDGE, C.J. This case raises some nice questions of law. I could wish that we had had the advantage of the argument of counsel. The conclusion at which I have arrived is, that

the conviction may be allowed to stand. The question which we have to consider is not whether the prisoner was a servant and embezzled, but whether there was evidence to justify a conviction for larceny. Probably the prisoner was intrusted with the horse for sale, the jury have so found, and the evidence of the prosecutor would seem to shew that that finding was correct. He was then to sell the mare, and to receive the money derived from such sale, and then to hand it over to the prosecutor or to his agent, who in this case was his wife. It seems to me that as soon as the prisoner had sold the mare the wife was entitled to the money, and being asked by the wife for the money, he became bailee of the money, and was guilty of larceny of that money of which he was bailee.

GROVE, J. I must say I have some doubt upon this matter, but upon the whole I think there was evidence that the prisoner took the prosecutor's money and carried it away, being a bailee of it.

FIELD, J. I am of the same opinion. I had considerable doubt about the point, and my doubt was whether the prisoner was in truth a bailee. Now it was the fair, horses were being sold for cash at that fair, and the prisoner, in whose charge the mare had been put by the prosecutor, sold her, and according to the evidence received some money for her, which was, as a witness proved, 15*l*. Now was he a bailee? In the present case there was no usual course of dealing between the parties by virtue of which the prisoner had a right to mix the money he received with his own moneys so that no specific money was his employer's. On the contrary, in the present case the prisoner ought to have handed over the money that he had received at once, as I read it, to the prosecutor, or to his wife. The conviction, therefore, can be supported.

STEPHEN, J. I am sorry to be compelled to differ from my Lord and the majority of the Court, the difference, however, is upon the view we take of the facts. My view is that the man who has been convicted was not the bailee of the money. I think

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he received the money with no obligation to return the identical coins, and that the present case is governed by *Reg.* v. *Hassall.* (1) Cockburn, C.J., in that case states that which it is not disputed is the law, that "the word bailment" must be understood as meaning in the Larceny Act "a deposit of something to be returned in specie." Was this man bound to return the precise coins he received; as I read the evidence such supposition is expressly negatived. I must say I do not understand why the chairman directed the jury that there was no evidence that the man was servant to the prosecutor, but however that may be, that is not the question for us, though it certainly seems to me that the man was authorized to sell the mare in the ordinary way, that his action was not interfered with by the wife, who never objected to a cheque being, as she supposed, cashed, thus shewing that he was not supposed to be obliged to hand over the particular cheque or particular coins he might have received, the parties considering that what was required was that the amount received should be paid, not the specific coins.

SMITH, J. I agree with the majority in this matter. The difficulty is on a question of fact, viz., whether the prisoner was a bailee of the money or not. I think there was some evidence that he was bound to hand over the particular money, the wife asks for the money, the prisoner in no way objects to pay the money, though he will not and does not do it, and the jury may have found all those statements of the prisoner about the cheque to be entirely untrue.

Conviction affirmed.

(1) L. & C. 58; 30 L. J. (M.C.) 175.

C. D.

[CROWN CASE RESERVED.]

1884
May 10.

THE QUEEN *v.* MALLORY.

Criminal Law—Evidence—Husband and Wife—Statement of Wife in presence of Husband—Admission.

Upon the trial of a prisoner for feloniously receiving stolen property, a list of the stolen articles which the prisoner, who was a marine store dealer, had bought, was received in evidence in order to shew that he had bought at an under value. The circumstances under which the list was written were as follows: A police constable asked the prisoner to consider when he had bought the stolen property, to which the prisoner replied that his wife should make out a list of it, and on the next day the prisoner's wife in her husband's presence handed to another constable the list tendered in evidence, saying in her husband's hearing "this is a list of what we bought, and what we gave for them." The question reserved was whether such list was properly admitted in evidence:—

Held, by the Court (Lord Coleridge, C.J., Grove, Field, Stephen and Smith, JJ.), that the list was clearly admissible in evidence.

THE following case was stated for the opinion of this Court.

"The prisoner, George Mallory, was tried at the East Riding of Yorkshire Quarter Sessions, held at Beverley, on the 9th of April, 1884, for receiving certain articles, the property of Agnes Fitzpatrick, knowing the same to have been stolen. The prisoner was a marine store dealer, and it appeared from the evidence that the stolen articles were such as he might have bought in the lawful exercise of his business. It was not disputed by the prisoner (who was represented by counsel) that the goods had been actually stolen by the man who brought them to his shop, and the price given by the prisoner for the articles thus became a material question in the case. With the object of shewing that the amount so paid was much less than the real value of the stolen goods, the counsel for the prosecution proposed to put in evidence a list of the articles bought by the prisoner with the amount paid by him for each of the several articles.

"The circumstances under which the list was tendered sufficiently appear from the following notes taken at the trial:—

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"John Duke, police-constable (after explaining the tracing, &c., of the stolen property), says: 'I asked Mallory when he bought them. He was much put out, and said he could not say, and I asked him to consider, and he said he would, and his wife would make out a list.' This was on the 30th.

"William Winterbottom, superintendent of police, said: 'I went to the prisoner's house on the 31st, prisoner and his wife were there, and the wife in her husband's (Mallory's) presence handed me a list of goods with dates and prices, she said, 'this is the list of what we bought and what we gave for them.' The prisoner did not speak, but he heard what she said, and saw the list handed to me. I believe the whole of it is in the wife's handwriting." This witness then produced the paper, and the counsel for the prosecution tendered it in evidence.

"The counsel for the prisoner objected to its admission on the grounds—

"1. That the wife would be the proper person to prove its contents, and the evidence of a wife is not admissible against or for the husband.

"2. The paper is neither more nor less than the evidence of the wife against the husband, and is therefore inadmissible.

"3. There is no evidence that the husband knew or saw the contents before it was handed to the superintendent, nor that it was made by his direction, and in a criminal case the wife cannot be the agent of her husband.

"I admitted the paper (which was read to the jury by the clerk of the peace) reserving for the consideration of the Court of Crown Cases Reserved the question as to whether or not I was right in doing so. It was proved that the value of the stolen property was greater than the sum shewn by the paper to have been paid by the prisoner. There was no other evidence of the price he paid.

"The jury convicted the prisoner. The question for the Court is whether the paper above-mentioned was rightly admitted in evidence. If so the conviction is to stand, otherwise to be quashed. The list was as follows:—

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22 January	Brass rods	0	1	6
23 „	Sheets table cloths towels . . .	0	6	0
24 „	Blankets canvas knives forks spoons 3 pillows	0	13	0
25 „	Tea service 2 cruets 5 pillows peice carpet	0	13	0
26 „	Fether bed	0	14	0
28 „	2 fether beds small looking glass	1	12	0
29 „	1 Looking glass orments . . .	0	6	0"

E. Silvester, for the prisoner. A wife may not by law give evidence in court on oath in such a case as the present against her husband, and it is submitted that she may not do so indirectly by making statements out of court to a police-constable. This list is in substance the wife's account of a transaction put on paper. Can the law be that, by examining a wife out of court in her husband's presence, her evidence can be procured and used against her husband by some third person narrating it in court, who may not be contradicted by the oath of the accused husband or by the evidence of the wife herself? This list it is submitted can hardly be put in evidence as admitted by the husband, for he never examined it, so far as appears, and had not the opportunity of contradicting it before the constable, though if he had contradicted it before the constable he could not give evidence himself to prove such contradiction nor could he call his wife to prove such contradiction, therefore evidence of this kind is dangerous evidence to receive, and it is submitted should be rejected. Nor can it be admitted upon the ground that there was evidence of authority given by the prisoner to his wife to make it out, because in a criminal case the admission of an agent is not evidence against the principal: *Lord Melville's Case*. (1)]

[STEPHEN, J., referred to *Daniell* v. *Pitt*. (2)]

No counsel appeared for the prosecution.

LORD COLERIDGE, C.J. If this had been communicated to the police in the absence of the prisoner by the prisoner's wife, I

(1) 29 How. St. Tr. 750, 764. (2) 1 Camp. 366, n.

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might have doubted whether the evidence could have been admitted, but here the prisoner upon being asked questions says in substance, "my wife will make out my answer for me," and then on the next day another policeman goes there, sees the husband and the wife together, and then the wife hands over the statement which her husband had ordered her to make out for him. She hands it over as her husband's statement, and in his presence, and he never denies this, or says that there is any mistake with regard to it. Had he wished to contradict the list, or his wife's statement, he could have done so, he did not, and the evidence is clearly admissible.

GROVE, FIELD, STEPHEN and SMITH, JJ., concurred.

Conviction affirmed.

Solicitor for prisoner: *J. R. Cooper, Bridlington.*

C. D.

March 29.

IN RE CANN. EX PARTE HUNT & Co.

Bill of Sale—Statement of Consideration—Solicitor acting for both Parties—Deduction of Bill of Costs—Bills of Sale Act, 1878, *s.* 8.

A bill of sale in its operative part was stated to be given "in consideration of the sum of 10*l.* now paid by H. to C." In the preparation of the bill of sale D. acted as solicitor for both H. and C., and on the execution of the deed retained, with C.'s consent, 9*l.* out of the 10*l.* in payment of his bill of costs in the matter, and only handed C. the balance of 1*l.*:—

Held, that, under the circumstances, the consideration was truly stated in the deed so as to satisfy s. 8 of the Bills of Sale Act, 1878, for that, on the execution of the deed, D. no longer held the money as agent for H. or had any duty to perform towards him, but held the money as C.'s agent, and could with C.'s consent retain the amount of his bill of costs.

In re Firth (19 Ch. D. 419) distinguished.

THIS was an appeal from the County Court of Cornwall, holden at Truro.

By a bill of sale dated the 28th of February, 1880, and made between Zeffert of the first part, Cann of the second part, and Hunt & Son, Limited, of the third part, after reciting that Cann

was indebted to Hunt & Son in the sum of 72*l.* 6*s.* 11*d.*, and that they had agreed to advance and lend him a sum of 69*l.* upon having the same, together with the said sum of 72*l.* 6*s.* 11*d.* secured in manner thereinafter appearing, and reciting a bill of sale dated the 19th of November, 1879, under which Cann was indebted to Zeffert in the sum of 59*l.*, it was witnessed that in consideration of the sum of 59*l.* paid by Hunt & Son to Zeffert at the request of Cann . . . . "and in consideration of the sum of 10*l.* now paid by Hunt & Son to Cann, and of the sum of 72*l.* 6*s.* 11*d.* due and owing to Hunt & Son by Cann (the payment and receipt of which said several sums of 59*l.* and 10*l.* and the amount of the said debt of 72*l.* 6*s.* 11*d.*, making together the full consideration money of 141*l.* 6*s.* 11*d.*, Cann doth hereby admit and acknowledge)," Zeffert and Cann assigned unto Hunt & Son the goods, chattels, and effects therein mentioned, by way of mortgage, as security for the repayment to Hunt & Son by Cann of the said sum of 141*l.* 6*s.* 11*d.* with interest.

On the 20th of July, 1883, Hunt & Son seized the property comprised in their bill of sale, and on the 24th of July, Cann filed his petition for liquidation, under which resolutions for liquidation by arrangement were subsequently duly passed, and a trustee was appointed.

On the 13th of December the county court judge, on the application of the trustee, declared that the bill of sale was void on the ground that the consideration was not truly stated under s. 8 of the Bills of Sale Act, 1878. Hunt & Son appealed.

The circumstances under which the bill of sale was given and prepared were these:—In December, 1879, Cann owed Zeffert 59*l.* under a bill of sale. He also owed Hunt & Son 72*l.* 6*s.* 11*d.* for goods supplied to him, and he owed besides some 400*l.* to other creditors. Being in difficulties, he went to his solicitor, Mr. Daniell, and instructed him to ask Hunt & Son to pay off Zeffert and also to make him a further advance of 10*l.*, which ultimately they agreed to do upon having a bill of sale for their debt and the contemplated advance. At this time Mr. Daniell was also acting for Hunt & Son. The bill of sale was accordingly prepared by Mr. Daniell, and after it was executed and Zeffert had been paid off, the sum of 10*l.* remained in the hands of

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Mr. Daniell, who deducted therefrom, with the consent of Cann, the sum of 9*l.* for his bill of costs of and incidental to the preparation of the deed, and handed the balance of 1*l.* to Cann. This bill of costs, which was produced to Cann at the time he executed the deed, contained usual charges for the stamping and registration of the deed and for the affidavit in support of the registration, which were admittedly incurred shortly after the execution of the deed.

Winslow, Q.C., and *R. V. Williams*, for the appellants. The consideration was truly stated. Although Daniell in some respects acted for Hunt & Co., yet everything was really done at Cann's request. He was the principal moving party in the transaction. The money was received from Hunt & Co. by Daniell as Cann's agent, and the 9*l.* was properly applied by Daniell, with Cann's consent, in payment of the bill of costs then due to him. If the transaction had fallen through, Daniell could not have charged these costs against Hunt & Co. The case is within the principle of *Ex parte National Mercantile Bank* (1) and *Ex parte Challinor.* (2)

Robinson, Q.C., and *Yate Lee*, for the trustee. The bona fides of the transaction is not disputed, but the point must be decided on legal principles. It is clear that the consideration is not truly stated.

[CAVE, J. How do you say the consideration should have been stated?]

It should have run thus:—"In consideration of 9*l.* paid or retained in respect of costs already incurred and to be incurred, and of 1*l.* paid to Cann." The case is governed by *In re Firth.* (3)

[CAVE, J. The facts there were totally different. It was a money lender's case, and undoubtedly a sum of 30*s.* was improperly retained by the lender. Here the same solicitor acts for both parties. He properly does not hand over any money until the deed is executed. After its execution Cann could have insisted upon the money being paid to him. It was money held

(1) 15 Ch. D. 42. (2) 16 Ch. D. 260.
(3) 19 Ch. D. 419.

by Daniell for the use of Cann, and, having a bill of costs against Cann, he retains 9*l.* in payment of it with the consent of Cann.]

Some of the items were incurred after the bill of sale was completed.

[CAVE, J. No. The bill of sale was not complete until registration. If Cann had sued him for this 10*l.* he could have set off against it this bill of costs.]

No doubt money may be retained to pay a debt due at the time the deed is executed, but not for costs to be incurred in completing the transaction. If this appeal succeeds it will probably open a door to great fraud, and the evil remedied by the Act of 1878 will be revived.

Counsel for the appellants were not called on to reply.

CAVE, J. I do not entertain any doubt with regard to this case. The mortgagees, Messrs. Hunt & Son, are not money-lenders, but had supplied goods to Cann in the ordinary way of business; and being somewhere in the North of England, they applied to a solicitor on the spot at Camborne in Cornwall, who had previously acted for them in similar cases, to obtain payment of the amount which was due to them. The solicitor finds that the debtor is apparently an honest man, although he has had the misfortune to get into the hands of Mr. Zeffert, a money-lender, who had taken from him a bill of sale upon somewhat exorbitant terms, and thereupon an arrangement was ultimately made whereby Messrs. Hunt & Co. were to advance the money to pay off Mr. Zeffert, and also a further sum of 10*l.*, and for that they were to have this bill of sale given to them. Now, the debtor undoubtedly saw Mr. Daniell, or Mr. Cartwright, who was his managing clerk, and told them what his circumstances actually were, and a great deal of good work was undoubtedly done by them for him, because they did get him out of the hands of Mr. Zeffert. It is clear, therefore, that Mr. Daniell was in that acting in the interests of the debtor. Then, inasmuch as Cann had no money at all, was in difficulties, could not pay his rent, and had not money even for his incidental expenses, Mr. Cartwright suggests to Mr. Cann that Hunt & Co. should lend him an additional 10*l.* Cann assents to an application for a loan of this additional sum of 10*l.* That sum

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of 10*l.* Hunt & Co. agree to lend, and it is actually included in their cheque for 69*l.* to Mr. Daniell. Now what was the duty of Mr. Daniell under those circumstances? He was acting both for lender and borrower, and consequently he was bound to see that the interests of both were protected. His first duty was to see that the lender got a proper security for the sum of money he was going to lend before he parted with that sum of money, and consequently his duty was to see that the security was obtained. What does he do? He sends the cheque for 59*l.* to Mr. Zeffert, and gets the bill of sale executed by him; he then gets it executed by Mr. Cann, and at the time when he gets it executed by Cann the security is perfected. It is then his duty to hand over the 10*l.* to Cann. He has no further duty as far as Hunt & Co. are concerned with regard to the 10*l.* Hunt & Co. have not stipulated that the 10*l.* is to be kept by him, or done anything with except handed over to Cann. That was, the moment the security was completed, the only duty which Daniell owed in respect of Hunt & Co. Well, that being the state of things, and inasmuch as the money had been borrowed of Hunt & Co. for the very purpose of paying the incidental expenses, and that had been done with Cann's knowledge, a statement of the incidental expenses is made out, and is delivered to Cann, and that amounting to 9*l.*, Cann receives the balance of 1*l.*, and signs a receipt for the money. Now, it was no part of Daniell's duty, so far as Hunt & Co. were concerned, to see that this money was so paid. Hunt & Co. did not care one penny whether it was so paid or not. There was no engagement between Hunt & Co. and Daniell that the money should be so paid; whether it was paid in that way or not was a concern of Daniell's, but none at all of Hunt & Co. If Daniell had chosen to hand over the 10*l.* in money to Cann on the completion of this bill of sale he could not have looked to Hunt & Co. to pay any of these costs which had been incurred in the preparation of it. It was a matter of the most perfect indifference to Messrs. Hunt & Co. They took the bill of sale which was given partly in consideration of the 10*l.*, and paid the 10*l.* to Daniell for Daniell to hand over to Cann, and that, as I have said, was the only duty which Daniell owed them with respect to the money. I asked Mr. Robinson how the consideration

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should have been stated, and he suggested that it should have been thus: "In consideration of 9*l.* paid to Daniell in respect of costs incurred and to be incurred." But it was not paid to Mr. Daniell "in respect of costs incurred and to be incurred," it was paid to Mr. Daniell as a loan for Cann. There was no obligation on the part of Daniell or Cann to apply it in payment of those costs, but Cann applied it for that purpose, and Mr. Daniell received it, as between him and Cann, with the knowledge of both of them, that it was the intention that it should be so applied. But neither of them was bound, as far as Hunt & Co. were concerned, to apply it in that manner, therefore it cannot be said that that was part of the bargain which Hunt & Co. made in the matter. Then Mr. Robinson said also that the statement should have gone on "and of 1*l.* paid to Cann in cash." There is no distinction between the 9*l.* and the 1*l.* The whole sum of 10*l.* was paid on the same footing, and the moment you find this sum was paid to Daniell on account of Cann, it seems to me impossible to describe the transaction with accuracy in any other manner than it is described in this bill of sale. Now, as I have said, at the moment this bill of sale was executed Cann had a right to come to Daniell and demand the 10*l.* When I say he had a right, I mean as far as Hunt & Co. were concerned, because as between Cann and Daniell the understanding between them was that the money was to be borrowed by Cann and applied by Daniell as Cann's agent in paying those incidental expenses. That is exactly what was done, and the balance was handed over to Cann. It is impossible to place any other interpretation upon those facts than that the consideration was stated here with perfect accuracy.

There is not the least ground for supposing in this case that Cann has been in any way imposed upon or illtreated, and if I were to hold this bill of sale bad because possibly in some other case a borrower may be imposed upon or illtreated, I should be doing an enormous wrong, and possibly preventing borrowers from ever obtaining an advance from any honest person. When frauds are committed this Court will be perfectly able to distinguish between the honest and genuine transaction, which I am convinced this is, and transactions which may be found to be

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frauds when brought to light. This Court will not have the slightest difficulty in dealing with such cases and dealing with fraudulent persons as they deserve. I am of opinion that this bill of sale is good, and that the consideration for it is properly stated. The appeal, therefore, must be allowed with costs.

Appeal allowed.

Solicitors for appellants: *Sharpe, Parkers, & Co.*
Solicitors for trustee: *Bolton, Robbins, Busk & Co.*

H. L. F.

March 11.

IN RE SPEIGHT. EX PARTE BROOKS.

Bankruptcy—Appeal—Preliminary Objection—Costs—Practice.

When the respondent to an appeal intends to take a preliminary objection he should give notice to the appellant of his intention so to do. If no such notice is given and the objection prevails, the appeal will be dismissed without costs.

THIS was an appeal from an order by a county court judge making absolute an order nisi for an injunction, which the trustee had previously obtained against the appellant.

R. V. Williams, for the appellant.

Winslow, Q.C., and *H. Reed*, for the respondent, took the preliminary objection that the appellant had no locus standi. She had not appeared in the Court below on the hearing of the application on which the order now appealed from was made. If her non-appearance had been caused by mistake or some other good reason, she ought to have applied to the county court judge to rehear the application.

R. V. Williams. The objection is fatal, but it has come upon the appellant by surprise. There has been no notice of any intention to take this objection, and the appeal should be dismissed without costs.

Winslow, Q.C. The respondent was not bound to give notice of the objection. The usual order as to costs should be made.

CAVE, J. This appeal must be dismissed because the objection that has been taken is insuperable. But the proper course

to pursue in cases of this kind is that the party intending to take a preliminary objection, which may be fatal, should give notice to the other side of his intention at the earliest possible moment. Then if the party having received such a notice chooses to go on with his appeal, he knows he does so at the peril of having to pay the costs if he fails. But when such an objection is taken at the very last moment and succeeds, I think that costs ought not to be allowed. In this case the appeal will be dismissed, but without costs.

Appeal dismissed.

Solicitors for appellant: *Elliott & Ash.*
Solicitors for respondent: *Peace & Co.*

H. L. F.

IN RE WAKEHAM. EX PARTE GLIDDON.

March 25.

Bankruptcy—Partner in one Firm the secret and sole Principal in another Firm —Bankruptcy of both Firms—Right of Proof by one Firm against the other.

A. and B. traded in partnership as A. & Co. in England and abroad, A. managing the home business and B. the branch abroad. C. and D. carried on business in England as D. & Co. under an agreement by which C. was to be the sole principal of D., who was to be the manager of the business at a salary with a share of profits. Business transactions took place in England between A. & Co. and D. & Co., and on the bankruptcy of both firms a large balance was due to A. & Co. from D. & Co. C. was in fact the agent of A., who was the secret and sole principal of D., but this was unknown to B. and D. until after the bankruptcy, and D. had held himself out to A. & Co. and others as a principal. The trustee of A. & Co. tendered a proof against the estate of D. for the balance due from D. & Co. to A. & Co.:—

Held, that the proof could not be sustained, for that, under the circumstances, there was no contract between D. and A. that D. should pay for the goods that had been supplied.

THIS was an appeal from the County Court of Lancashire holden at Liverpool.

From the beginning of the year 1881 till the filing of their liquidation petition, P. Carvill and G. McKean carried on business in co-partnership under the firm of F. Carvill & Son in London and at Liverpool, and under the firm of Carvill, McKean & Co. at New Brunswick, in Canada. During this time P. Carvill

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resided in London, and managed the London and Liverpool branches of the business, and G. McKean resided in Canada and managed the branch at New Brunswick.

On the 7th of July, 1881, an agreement in writing was entered into between T. A. Gartlan, of London, and R. Wakeham, of Liverpool, by which T. A. Gartlan agreed to employ R. Wakeham in the preserve provision trade, &c., and R. Wakeham agreed to serve as manager for a period of seven years subject to the following conditions (amongst others):—

"The business assets and the goodwill thereof, although carried on under the style of Richard Wakeham & Co. or otherwise, shall be the exclusive property of the said T. A. Gartlan.

"The capital required shall be supplied by the said T. A. Gartlan, but the amount shall be at his discretion according to the progress of the business.

"T. A. Gartlan shall also be liable for all debts of the business properly incurred.

"R. Wakeham is to devote his entire energy and time to the carrying on of the proposed trade under the direction of T. A. Gartlan, or his representative, and in return he shall have a fixed sum of 250*l.* per annum, with a commission of 12½ per cent. on the net profits of the business.

"The said business shall in all respects be carried on as T. A. Gartlan may direct, and R. Wakeham will keep him fully advised of all that goes on, and will keep the accounts punctually written up, &c."

T. A. Gartlan was the brother-in-law of P. Carvill, and was his trustee or agent in the matter of this agreement, and P. Carvill was in fact the sole and secret principal of R. Wakeham, but this was unknown to the latter until after the bankruptcy.

Large business transactions took place between the firms of F. Carvill & Co. and R. Wakeham & Co., and at the date of the bankruptcy of both firms 7490*l.* 11*s.* 7*d.* was due from R. Wakeham & Co. to F. Carvill & Co. for goods supplied and moneys lent in the ordinary course of business. During this period the business of R. Wakeham & Co. was conducted by R. Wakeham, who held himself out to F. Carvill & Co. and others as a principal. G. McKean was unaware of the transactions taking place between

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R. Wakeham & Co. and F. Carvill & Co., as no detailed statement of the accounts of the latter firm were sent to him after 1880. He was also wholly unaware that P. Carvill was the secret principal of R. Wakeham until after the bankruptcy.

On the 13th of January, 1883, P. Carvill and G. McKean presented their petition for liquidation, and subsequently R. Wakeham was adjudicated bankrupt on a creditor's petition.

On the 3rd of July a proof tendered by Gliddon, the trustee in liquidation of Carvill & Co., against the estate of Wakeham, for the 7490*l.* 11*s.* 7*d.* was rejected by the trustee of the latter on the ground that P. Carvill was a common partner in both firms, and that the debt was not due from Wakeham, but from P. Carvill himself, and this objection was upheld by the county court judge.

Gliddon appealed.

March 24. *E. C. Willis, Q.C.*, and *Mews*, for the appellant. On the true construction of the agreement Wakeham was a partner with Gartlan, and in fact he held himself out as a principal. He is, therefore, liable as a partner. Lindley on Partnership, 4th ed., pp. 22, 24; *In re Rowland and Crankshaw* (1); *In re Pulsford.* (2) Under the circumstances Carvill & Co. have a general right of proof against Wakeham & Co. for the balance of their debt, although P. Carvill is a partner in both firms.

[CAVE, J. Is that the true position? Is not P. Carvill really Wakeham & Co.?]

These were distinct businesses. Carvill & Co. looked only to Wakeham, who held himself out to them as a principal. If P. Carvill has improperly withdrawn the partnership assets of Carvill & Co. and applied them in carrying on a business for himself, that firm can prove against his separate estate: *Ex parte Lodge* (3); and if he associates another man with himself in the separate business the right of proof against his estate still subsists: *Ex parte St. Barbe* (4); and the person associated with him has only a right of indemnity against him. Further, McKean had no knowledge of all these proceedings or that P. Carvill

(1) Law Rep. 1 Ch. 421.
(2) 8 Ch. D. 11.
(3) 1 Ves. 166.
(4) 11 Ves. 413.

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was the secret principal of Wakeham, and he cannot be bound unless it be held that he had constructive notice: Lindley on Partnership, 4th ed., p. 287. But constructive notice does not apply in cases of fraud: *Lacey* v. *Hill* (1); *Williamson* v. *Barbour* (2); *Ex parte Yonge* (3); *Ex parte Smith* (4); Lindley on Partnership, 4th ed., p. 469.

Robinson, Q.C., and *F. Thompson*, for the respondent. No right of proof exists here. In these cases there can be no proof except for that sum for which an action could be maintained: *Ex parte Dewdney* (5); *Ex parte Macredie.* (6) If P. Carvill was the only partner in Carvill & Co. he clearly could not prove. If he cannot prove then the firm in which he is a partner cannot prove: *Jones* v. *Yates* (7); because they are not seeking to treat the transaction as a fraud, but they have adopted the transaction, and therefore they cannot prove until all Wakeman & Co.'s debts are paid. If it is necessary to fix McKean with constructive notice, then under the circumstances McKean had constructive notice of what was going on: *Collinson* v. *Lister* (8); *Porthouse* v. *Parker* (9); *Jacaud* v. *French* (10); *Steele* v. *Stuart* (11): *In re Worcester Corn Exchange Co.* (12); *Dresser* v. *Norwood* (13); *Ex parte Bell* (14); *Biggs* v. *Lawrence* (15); Lindley on Partnership, 4th ed., pp. 287, 469, 472. But in truth constructive notice is immaterial here because McKean has ratified and adopted the transaction, and by seeking to prove for the balance of the debt must be taken to adopt it with knowledge of all the circumstances under which the advances were made. Therefore Carvill & Co. cannot sue for this debt or prove in competition with the other creditors of Wakeham & Co. Lastly, there has been no holding out by Wakeham to McKean, because the latter, it is admitted, knew nothing of what was going on.

E. C. Willis, Q.C., in reply. Under the agreement there was no

(1) 4 Ch. D. 537, 549.
(2) 9 Ch. D. 529.
(3) 3 V. & B. 31, 36.
(4) 1 Gl. & J. 74.
(5) 15 Ves. 479.
(6) Law Rep. 8 Ch. 535.
(7) 9 B. & C. 532.
(8) 7 D. M. & G. 634.
(9) 1 Camp. 82.
(10) 12 East, 316.
(11) Law Rep. 2 Eq. 84.
(12) 3 D. M. & G. 180.
(13) 17 C. B. (N.S.) 466.
(14) 1 M. & S. 751.
(15) 3 T. R. 454.

contract of service between Wakeham and P. Carvill, but Wakeham was Gartlan's servant. Wakeham was to be the sole ostensible principal, carrying on the business, and Gartlan was to indemnify him against all liabilities. Wakeham can sue Gartlan for the debts of the business; but he cannot jump over Gartland and attack P. Carvill, although it may be that Gartlan has a right of indemnity over against P. Carvill. Wakeham is liable to pay for the goods, because either he knew that P. Carvill was his secret principal and yet held himself out as a principal to the firm of Carvill & Co., and did not intend to pay, which would be a fraud, or he did not know and intended to pay. In either case the creditors of Wakeham & Co. have no equity to be preferred to Carvill & Co.

March 25. CAVE, J. This is an appeal from the judgment of the learned judge of the county court at Liverpool, affirming the decision of the trustee in bankruptcy of Wakeham, rejecting a proof by the trustee of Carvill against the estate of Wakeham and G. McKean.

Now at the time when it is necessary to consider the facts of this case, P. Carvill and G. McKean carried on business under the name of F. Carvill & Son. Carvill resided in London and carried on the business there and at Liverpool, and McKean resided abroad in Canada, and practically took no part in the management of the business in England. Now Carvill determined to establish another business for his own separate benefit, and he did this through the intermediation of Gartlan. He established a business of Wakeham & Co., of which Wakeham was the ostensible, and Carvill the real principal. Then that having been done, Carvill without the actual knowledge of McKean sold goods and advanced money for the purpose of carrying on the business of Wakeham & Co. There is no doubt that so far as the world at large was concerned, Wakeham, and Wakeham only, was the ostensible principal, but Carvill was the real and secret principal of that business. It is perfectly clear that if any member of a firm in the situation in which Carvill was, had, without his partner's actual knowledge of the facts, supplied goods and lent money for the purpose of carrying on the business of Wakeham & Co.,

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whether or not the lending of money would be within the scope of his authority as a member of that firm, yet the partner who was ignorant of that transaction might undoubtedly, when he came to know of it, ratify it, and the two together, the firm, might under those circumstances sue Wakeham & Co. for the goods so sold, and for the moneys so lent. That is upon this principle: Where goods are sold and money lent for the purpose of carrying on the business of a firm, the contract is made with the person who is the real principal, for whose benefit the goods are supplied, and for whose benefit the money is lent; and where there is an ostensible principal who is not a real principal, the person who has supplied the goods and lent the money, in the belief that the ostensible principal is the real principal, is permitted either to sue the ostensible principal upon whose credit he supplied the goods and lent the money, or, if he elect to do so, the real principal who has actually benefited by the transaction.

Now what is the case here? Carvill supplied these goods, and advanced this money, and whether he was, or was not, acting within the scope of his authority as between him and McKean in so doing is immaterial, because, whatever it is that he has done, McKean has ratified it, and claims to have the benefit of the contract which Carvill made. Well then, what was the contract which Carvill made? Now undoubtedly if he had believed Wakeham to be the real principal, although Wakeham was not, he would have been at liberty, upon the ordinary doctrine of estoppel, and McKean also would have been at liberty, to have sued Wakeham as the ostensible principal upon the faith of whose being the real principal the goods had been sold and the money lent. But in this particular case Carvill knew the whole of the circumstances; he knew that Wakeham had no interest in the business; he knew that Gartlan had no interest in the business; he knew that the only person who had any interest in that business was himself, Carvill, and consequently under those circumstances the person whom he must be taken to have trusted is himself. There is no estoppel as between Carvill and Wakeham, as Carvill knew the whole of the circumstances. He never supposed for a moment he was making Wakeham personally liable, and he never supposed for a moment he was making Gartlan

personally liable, because he knew perfectly well that the real principal of the business of Wakeham & Co., for whose advantage the goods were being supplied and the money lent was himself, Carvill, and no one else. It follows, therefore, that what Carvill did in advancing this money and selling these goods created no contract between him and Wakeham, and no contract at all between him and Gartlan; not, however, that that fact is material to the present case, because we are simply dealing with Wakeham. It is enough to say that what Carvill did created no contract at all between him and Wakeham to pay for the price of those goods, or to repay the moneys so advanced. That being so, there is no contract with Wakeham which McKean can ratify, and when he comes afterwards to ratify (assuming it required ratification by him), that which Carvill has done, he can only ratify what Carvill has actually done, he can only take advantage of the contract which has actually been made, and not of a contract which Carvill never dreamt for one moment of making. I quite agree that if there had been a real contract by Wakeham to pay the partnership for these goods, and to repay these moneys, it would have been no answer at all to say that he had got a contract with Carvill to be indemnified by Carvill. But that is not the case here, and the foundation of the whole thing fails, because, in my opinion, there never was a contract between Wakeham and Carvill that Wakeham should pay for these goods—consequently nothing of which McKean could take advantage and which he could ratify, and nothing on which the partnership could sue.

It follows, therefore, that the judgment of the learned county court judge was right, and that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Robins, Cameron, & Kemm.*
Solicitors for respondent: *Field, Roscoe, & Co.*

H. L. F.

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IN RE J. & H. DAVISON. EX PARTE CHANDLER.

Bankruptcy—Breach of Trust by Firm—Joint and several Liability—Joint Judgment against Firm—Merger of several Liability—Bankruptcy of Firm —Right of Proof against Separate Estate.

Where a firm is adjudicated bankrupt on a judgment debt recovered against the firm jointly, if the partners are also severally liable in respect of the same matter by reason, for instance, of its arising out of breach of trust, the several liability of the partners is not, solely by reason of the creditor having sued for and obtained a joint judgment, merged in such judgment, so as to preclude a proof by the judgment creditor against their respective separate estates.

THIS was an appeal from the Registrar, sitting as County Court Judge, at Salisbury in Wiltshire.

In August, 1879, J. & H. Davison, who were in partnership as auctioneers and estate agents at Andover, acting under instructions from the executors of W. Blenkiron, deceased, sold some property of the testator, and received the proceeds of sale, 2313*l.* 11*s.* 6*d.*

They paid the executors some moneys on account, but the latter being unable to obtain payment of the balance of the proceeds of sale, or any satisfactory account thereof, issued a writ against J. & H. Davison in the Queen's Bench Division, and recovered a judgment against them jointly for 755*l.* 3*s.* 5*d.*

On the 29th of January, 1880, the executors presented a bankruptcy petition against J. & H. Davison, grounded on this judgment, on which the debtors were adjudicated bankrupt, and on the 16th of February, 1880, G. Chandler was appointed the trustee.

The bankrupts in their accounts did not disclose either joint or separate assets sufficient to pay the costs of their bankruptcy. The executors proved against the joint estate on their judgment for the amount of their debt, interest, and costs.

In April, 1883, the executors, having become aware that the separate estate of H. Davison had become entitled to a considerable asset, a reversionary interest under a will, withdrew their proof against the joint estate, and on the 30th of October,

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1883, tendered a proof against the separate estate of H. Davison. This proof was rejected by the trustee on the ground that the executors had elected to prove against the joint estate.

On the 11th of January, 1884, the county court judge directed the proof to be admitted. The trustee appealed.

March 11. *Cooper Willis, Q.C.*, and *H. Reed*, for the appellant. If the respondents had any right in the first instance to treat the non-payment of this money as a breach of trust, they have waived that right, and by proceeding in the Queen's Bench Division have treated their claim as a legal debt, and have obtained a joint judgment on it as such. They have affirmed that judgment by grounding a bankruptcy petition on it and obtained an adjudication, and have carried in a proof against the joint estate on their joint judgment for principal, interest, and costs. Under these circumstances there was a merger of whatever several liability might have previously existed, and they cannot now, after three years, withdraw that proof and proceed de novo. The respondents, no doubt, will rely on *In re Collie* (1), but that was decided solely on a question of proof, and so was *Curtis* v. *Williamson*. (2) Though the mere filing of a proof may not be evidence of election, there may be other circumstances which shew an election, as in *Scarth* v. *Jardine*. (3) The non-payment of this money was not a fraud, but, assuming that it was, the proof was not made in respect of the fraud, but on the joint judgment, and under the circumstances the respondents have made their election and are bound by it: *Ex parte Bolton* (4); *Ex parte Barnett* (5); Griffiths on Bankruptcy. (6) There is no analogy between this case and those in which a proof has been carried in by the creditor, because here the creditors who carry in the proof against the joint estate themselves obtained the adjudication on a joint judgment.

Winslow, Q.C., and *A. Powell*, for the respondents. When a debt has been contracted by fraud or a breach of trust, the creditor has the right in bankruptcy of proving against either the

(1) 8 Ch. D. 807.
(2) Law Rep. 10 Q. B. 57.
(3) 7 App. Cas. 345.
(4) 2 Rose, 389.
(5) 1 Gl. & J. 309.
(6) Page 357.

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joint or separate estate. This was a fraud and also a breach of trust: *Pashler* v. *Vincent.* (1)

[CAVE, J. Having obtained a joint judgment are not all their remedies merged?]

Not for all purposes. In bankruptcy you can go behind the joint judgment and ascertain how the original debt was incurred, and if it was incurred by fraud then the right of joint and several proof arises: *Bryant* v. *Withers* (2); *Ex parte Griffiths* (3); *Ex parte Bryant.* (4)

[CAVE, J., referred to *Ex parte Christie* (5).]

That was a case of contract, and the original debt was not a joint and several but a joint debt. *Ex parte Waterfall* (6) illustrates the principle for which the respondents contend. Here they have never been in a position until recently to exercise their election, and therefore it is not too late for them now to elect. The cases shew that parties are not estopped by a joint proof unless there has been a deliberate election: *In re Collie.* (7)

[CAVE, J. *Ex parte Higgins* (8) seems opposed to that view.]

That was a case of deliberate election. Here there was no possibility of election, because the respondents did not know of the fraud until after the judgment.

Cooper Willis, Q.C., in reply. The appellants do not press the point as to election, but contend that the cases cited do not bear out the contention of the respondents that there has been no merger of the separate liability, and that they are now entitled to go behind the joint judgment.

[CAVE, J. Is there any authority to shew that there can be merger where there has been no election?]

No. *Ex parte Bolton* (9) is the nearest case to the present. But when a man has obtained a joint judgment he cannot afterwards go behind it: *Kendall* v. *Hamilton.* (10) Even if the respondents are entitled to go behind the judgment they have not

(1) 8 Ch. D. 825.
(2) 2 M. & S. 123.
(3) 3 D. M. & G. 174.
(4) 1 V. & B. 211.
(5) Mont. & Bl. 362.
(6) 4 D. & Sm. 199.
(7) 8 Ch. D. 807.
(8) 3 De G. & J. 33.
(9) 2 Rose, 389.
(10) 4 App. Cas. 504.

shewn that H. Davison was a party to the fraud or received any portion of the money.

Cur. adv. vult.

March 31. CAVE, J. (after stating the facts as above, continued as follows:—) Before me it was contended, first, that any separate cause of action the respondents might have had was merged in or waived by the action and judgment, and that, as the latter was joint only, there could be no proof against the separate estate. Secondly, that assuming the respondents could prove against the separate estate they had made out no case entitling them to do so.

The ground on which the trustee rejected the proof was not strongly insisted on before me, and obviously was not well founded. It was admitted that if the respondents had proved in an action in a Court of Equity before the Judicature Acts that the bankrupts had fraudulently misappropriated the money they had received for the respondents' use, the latter might have obtained a joint and several decree against them, and consequently, since the Judicature Acts, the respondents might have obtained a similar judgment in any Division of the High Court. Assuming that the circumstances would have warranted them in suing for and obtaining a joint and several judgment, does the fact that they have obtained a joint judgment only necessarily preclude them from proving against the separate estate of one of the bankrupts?

If so precluded, it can only be either because the separate cause of action is merged in the joint judgment, or because by suing on the joint cause of action they have elected to rely on that only, and have thus waived the separate cause of action. First, Is the separate cause of action merged in the joint judgment? Take the illustration of a joint and several note against A., B., and C., which is usually comprised in one document. The result is the same as if three separate notes were given as well as the joint note. If A. is sued to judgment on his separate note, is the joint note of A., B., and C. merged in the judgment? On principle why should it be? The object of taking a joint and several note is to have the separate liability of each promissor as well as

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the joint liability of all, and why should the fact that the separate liability of one promissor has merged in a separate judgment against him prove a bar to an action on the joint note? Is there any authority? *King* v. *Hoare* (1) is the leading case, and there it was held that a judgment without satisfaction recovered against one of two joint debtors was a bar to an action against the other, but it was pointed out both at the bar and in the judgment that the law is otherwise when the obligation is joint and several. This very point was decided as long ago as *Drake* v. *Mitchell.* (2) In that case one of three joint covenantors had given a bill of exchange for the debt secured by the covenant, on which bill judgment was recovered, and it was held that this judgment was no bar to an action of covenant against the three. Lord Ellenborough (3) said: "I have always understood the principle of transit in rem judicatam to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have." No authorities to the contrary can be found, and it seems clear both on principle and authority that a joint judgment is not a bar to a separate cause of action.

Neither is the separate cause of action gone by reason of the doctrine of election or waiver. This doctrine applies only where the person having the cause of action is put to elect between two inconsistent remedies, as in the case of the right to sue either the agent or the principal when disclosed: *Curtis* v. *Williamson* (4); or the old and new partners in a firm where the old partners are liable only by estoppel, as in *Scarf* v. *Jardine* (5); or in the case of the right to sue for a tort or to waive the tort and sue for the proceeds in the hands of the wrongdoer. In these cases the plaintiff may elect which remedy he will have, but when he has elected one remedy he has thereby waived his right to the other.

(1) 13 M. & W. 494.
(2) 3 East, 251.
(3) 3 East, p. 258.
(4) Law Rep. 10 Q. B. 57.
(5) 7 App. Cas. 345.

In this case on the contrary it is admitted that if the respondents could have proved a fraudulent misappropriation by the partners they might have had both a joint and separate judgment, and consequently there was no election and no waiver. I arrive, therefore, at the conclusion that there was nothing in this case to warrant the rejection of the respondents' proof on any technical grounds.

Mr. Willis, however, has raised the point that there was no sufficient proof of a separate cause of action on the facts, and I am of opinion that he is right in this contention. It does not follow from the mere existence of a joint judgment that the respondents are entitled to prove against the separate estate of each partner, as the respondents seem to have thought by proving on the judgment, including, which is clearly wrong, the costs of the action, for a partnership debt is not necessarily joint and several: *Kendall* v *Hamilton*. (1) The respondents must establish a separate cause of action against H. Davison; but as the proof was rejected upon a preliminary objection which has failed, and the merits have never really been discussed, I think the proper course will be to discharge the order of the Court below, to declare that the trustee was not justified in rejecting the proof on the ground taken by him, or on the ground taken before me, and that the respondents are entitled to prove against the separate estate of H. Davison, if they can establish a separate cause of action against him, as for instance, that he misappropriated, or was party to the misappropriation, of the respondents' money; for it is, of course, possible that although the money may have been misappropriated, it was misappropriated by the other partner alone in fraud of H. Davison, in which case there would be a separate cause of action against the other partner, but not against H. Davison, and in that case the respondents will not be able to prove against the separate estate of H. Davison. Of course if the trustee could shew that in the action the respondents claimed a separate judgment against H. Davison, but were unsuccessful in establishing a right to it, that would be an answer to their case, and would disentitle them to prove against H. Davison's separate estate, unless they could shew that this

(1) 4 App. Cas. 584.

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failure was brought about by the fraud of H. Davison. But I expect it will turn out that the joint cause of action was alone sued upon, in which case the judgment does not affect the right to prove; and, in any case, if the respondents succeed in establishing a separate cause of action, the burden will lie on the trustee of shewing that that separate cause of action was put forward and withdrawn, or disposed of adversely to the respondents, in 1879.

As the respondents have succeeded on the point mainly relied on, they must have the costs of the appeal. The trustee may take his costs out of the estate.

Appeal dismissed.

Solicitors for appellants: *Miller & Vernon.*
Solicitor for respondents: *J. Scott.*

H. L. F.

April 25.

[IN THE COURT OF APPEAL.]

EX PARTE COHEN. IN RE COHEN.

(No. 8208.)

Bankruptcy—Application for Order of Discharge before close of Bankruptcy—Assent of Creditors—Meeting summoned by Trustee—Advertisement—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 21, 48, 78—*Bankruptcy Rules*, 1870, *rr.* 89, 95, 138, 142.

When a meeting of the creditors of a bankrupt under the Bankruptcy Act, 1869, is summoned by the trustee (for the purpose, e.g. of ascertaining whether the creditors will assent to an application by the bankrupt for an order of discharge) it is only necessary that it should be summoned by means of a notice sent by the trustee to each creditor in accordance with the provisions of rule 95; it is not necessary that advertisements of the meeting should be published as provided by rule 89 in reference to the first meeting of the creditors.

Sect. 78 has not the effect of incorporating the Bankruptcy Rules into the Act for the purposes of construction.

But, even if the rules are to be considered as, by virtue of s. 78, incorporated into the Act, s. 21 does not make rule 89 applicable to meetings summoned by the trustee, a special provision for the summoning of such meetings being made by rule 95.

THIS was an appeal from the refusal of Mr. Registrar Murray to grant an order of discharge to Daniel Cohen, a bankrupt.

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The adjudication was made in March, 1883. The bankrupt passed his public examination on the 25th of July, 1883. The bankruptcy had not been closed, and a dividend of 10*s.* in the pound had not been paid. The bankrupt desired to obtain the assent of his creditors to his applying to the Court for an order of discharge, and, in accordance with the provisions of rule 142 of the Bankruptcy Rules, 1870, he requested the trustee to summon a meeting of his creditors, and deposited a sufficient sum for costs. The trustee thereupon summoned the meeting by sending a notice to each of the creditors of the time and place at which it was to be held, and the purpose for which it was summoned (in accordance with the provisions of rule 95). The day fixed for the meeting was the 27th of December, 1883. The trustee also advertised the meeting in the *London Gazette* of the 18th of December, 1883, but he did not advertise it in any local paper.

The meeting was held on the 27th of December, when the creditors by the proper statutory majority passed the following special resolution:—"That the bankruptcy and the failure to pay 10*s.* in the pound has arisen from circumstances for which the bankrupt cannot justly be held responsible, and we desire that an order of discharge should be granted to him, and assent to an application being made to the Court for the purpose." The application was accordingly made, and was heard by the registrar on the 19th of March, 1884. A report, dated the 28th of February, was made by the official assignee, in which he stated "that the meeting of creditors was called in accordance with rule 95, and was advertised in the *London Gazette* nine days previously, but no notice of the same was advertised in a local paper pursuant to s. 21 and rule 89." The registrar refused the application, without going into the merits, on the ground which was thus stated in his order: "It appearing that the meeting at which the resolution was passed granting the debtor his discharge had not been advertised in the *Gazette* ten days previously, and not at all in the local paper, the Court, being of opinion that such meeting had therefore not been properly summoned within the meaning of the Act and rules, doth refuse the application." (1)

(1) Sect. 14 of the Bankruptcy Act, 1869, provides that "when an order has been made adjudging a debtor bankrupt the property of the debtor

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The bankrupt appealed.

Winslow, Q.C., and *Herbert Reed*, for the appellant. It is not necessary that any meeting but the first meeting of the creditors

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shall become divisible amongst his creditors in proportion to the debts proved by them in the bankruptcy; and for the purpose of effecting such division the Court shall, as soon as may be, summon a general meeting of his creditors, and the creditors assembled at such meeting shall and may do" certain things, including the appointment of a trustee.

By s. 16 "the general meeting of creditors to be summoned as aforesaid by the Court, and in this Act referred to as the first meeting of creditors, shall be held in the prescribed manner and subject to the prescribed regulations as to the quorum, adjournment of meetings, and all other matters relating to the conduct of the meetings or the proceedings thereat: Provided that . . . . the meeting shall be presided over by the registrar."

By s. 20 "the Court may from time to time, during the continuance of a bankruptcy, summon general meetings of the creditors for the purpose of ascertaining their wishes, and may, if the Court thinks fit, direct the registrar to preside at such meetings."

By s. 21 "the provisions of this Act with respect to the first general meeting of creditors shall apply to any subsequent general meeting of creditors in a bankruptcy with this exception" . . . . "that subsequent meetings of creditors may be summoned by the trustee, or by a member of the committee of inspection."

Sect. 48 provides that "when a bankruptcy is closed, or at any time during its continuance, with the assent of the creditors, testified by a special resolution, the bankrupt may apply to the Court for an order of discharge; but such discharge shall not be granted unless it is proved to the Court that one of the following conditions has been fulfilled, that is to say," . . . . "that a special resolution of his creditors has been passed to the effect that his bankruptcy or the failure to pay 10s. in the pound has, in their opinion, arisen from circumstances for which the bankrupt cannot justly be held responsible, and that they desire that an order of discharge should be granted to him."

Sect. 78 enables the Lord Chancellor, with the advice of the Chief Judge in Bankruptcy, to make general rules, and provides that "any rules so made shall be deemed to be within the powers conferred by this Act, and shall be of the same force as if they were enacted in the body of this Act."

Rule 11 of 1870 provides that "where the Court orders a general meeting of creditors to be summoned under s. 20 of the Act, it shall be summoned as the Court directs, and in default of any direction the registrar shall transmit a sealed copy of the order to the trustee fourteen days at least before the time appointed for the meeting to take place, and the trustee shall, ten days before such meeting, send a copy of the order to each creditor at the address given in his proof, or, when he shall not have proved, the address given in the list of creditors by the bankrupt, or such other address as may be known to the trustee."

should be summoned by advertisement. The trustee has complied with the provisions of rule 95, and nothing more is necessary. It may have been the usual practice to advertise meetings of creditors to consider the question of assenting to the bankrupt's applying for an order of discharge, but it certainly has not been the universal practice, for in some cases certificates of discharge have been granted when the meeting of creditors to consider whether the bankrupt's application should be assented to had not been summoned by advertisement. If the ordinary practice has been to require the advertisements mentioned in rule 89, it has not been in accordance with the Act and the Rules. Sect. 21 applies to meetings subsequent to the first the provisions of *the Act* with respect to the first meeting, not the provisions of the Rules, and the Act contains no provision as to the summoning of the first meeting by advertisement. Rule 89 and rule 95 make distinct and independent provisions for the mode of summoning the first meeting by the Court and other meetings by the trustee. Before the first meeting it is not known who the creditors are, for the bankrupt is not obliged to make any statement of his affairs

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By rule 89, "The first meeting of creditors shall be summoned immediately after making an order of adjudication, by the registrar appointing a day for the first meeting of creditors, and by giving ten days' notice thereof in the *London Gazette*, and in one local paper."

By rule 95, "Where a meeting of creditors is summoned by a trustee it shall be summoned by the trustee transmitting to each creditor at the address given in his proof, or, when he shall not have proved, the address given in the list of creditors by the bankrupt, or such other address as may be known to the trustee, seven days before the meeting is to be held, a notice setting forth the time and place at which it is to be held, and the purpose for which it is summoned."

By rule 138, "A bankrupt intending to apply for an order of discharge shall file an application with the registrar, who shall thereupon fix the time and place at which the application will be heard. Notice of the time and place fixed for the hearing of the application for the order of discharge shall be gazetted, and also given to the trustee by the bankrupt twenty-one days before such day."

And by rule 142, "A bankrupt desirous of obtaining the assent of his creditors to his applying to the Court for an order of discharge during the continuance of his bankruptcy, shall request the trustee to summon a meeting of his creditors, and thereupon the trustee, upon the deposit of a sufficient sum for costs, shall summon such meeting."

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previously, therefore it would be impossible to give notice to the creditors otherwise than by advertisement. This difficulty does not exist after the first meeting, and therefore a distinct code is provided by rule 95 in relation to meetings summoned by the trustee. If s. 21 makes rule 89 apply to all meetings after the first, it would apply to meetings summoned by the Court under s. 20, for the summoning of which an express provision is made by rule 11, which does not require any advertisement. The creditors are amply protected by rule 138, which requires the day fixed for the hearing of the application for a discharge to be advertised. To require that the creditors' meeting should be summoned by advertisement, as well as in the mode prescribed by rule 95, would cause unnecessary expense.

Sidney Woolf, for the trustee, contended that the trustee had performed his duty as to the summoning of the meeting.

Cooper Willis, Q.C., and *F. Cooper Willis*, for a dissentient creditor. Advertisement is the life of bankruptcy as distinguished from liquidation by arrangement. There being no provision in the Act itself as to the mode of summoning meetings, s. 21 can have no operation at all, unless it applies to meetings subsequent to the first the provisions of rule 89 as to the summoning of the first meeting. This is the reasonable interpretation, and indeed by s. 78 the rules have the same force as if they were inserted in the Act, and it follows that they are really made part of the Act. Rule 95 is not substituted for rule 89 in the case of a meeting summoned by the trustee; its provisions are cumulative. Undoubtedly the general practice of the Court has been in accordance with this view, and that practice is consistent with a reasonable interpretation of the Act and Rules. If the bankrupt had absconded without making any statement of his affairs, there would be no means of summoning a meeting of his creditors except by advertisement. And, in any case, he may have inadvertently omitted some of his creditors from his statement. The trustee himself evidently thought that some advertisement was necessary, though he gave only nine days' notice in the *Gazette* instead of ten. If his contention is right, he should not have advertised at all.

Winslow, Q.C., in reply. Advertisement is the life of liquida-

dation by arrangement as much as of bankruptcy: rule 257. In *Ex parte Hopkins* (1) it was held that, for the purposes of summoning a meeting of creditors to remove the trustee or a member of the committee of inspection in a liquidation by arrangement, rules 304 and 305 are alone to be regarded, and the same principle applies to rule 95. When it is intended that a notice shall be gazetted the rules expressly say so.

BAGGALLAY, L.J. This is an appeal in a bankruptcy matter which was pending on the 1st of January, 1884, when the new Bankruptcy Act of 1883 came into operation, and being then pending it has to be wound up in accordance with the provisions of the Act of 1869 and the Rules of 1870. The singular part of the case is this, that we are now asked to say that a practice which has generally (if not universally) prevailed during the whole of the period in which the Act of 1869 was in force has been wrong, because it was not in accordance with the provisions of that Act. I feel the strongest possible objection to interfering with a course of practice which has been long established, and I should decline to do so unless I was convinced that the practice had been wrong. But being of opinion, for the reasons which I am about to give, that the practice in question has not been in accordance with the proper construction of the Act, I think that the present appeal ought to be allowed. Now the Act of 1869 and the Rules of 1870 made provisions for summoning general meetings of the creditors of a bankrupt. Those meetings may be arranged under three classes—(1) the first general meeting, (2) subsequent meetings summoned by the Court, (3) subsequent meetings summoned by the trustee. The present question arises in this way: The bankrupt applied to the Court for an order of discharge before the close of the bankruptcy, and without having paid a dividend of 10*s.* in the pound. Sect. 48 provides that a discharge shall not be granted unless several conditions are complied with; one of them being that, if the application is made during the continuance of the bankruptcy, the assent of the creditors, testified by a special resolution, must be given, and another being that, if a dividend of less than 10*s.* in the pound has been

(1) Law Rep. 9 Ch. 586.

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paid, there must be a special resolution of the creditors that the bankruptcy, or the failure to pay 10*s.* in the pound, has, in their opinion, arisen from circumstances for which the bankrupt cannot justly be held responsible, and that they desire that an order of discharge should be granted to him. Rule 142 prescribes the mode in which the bankrupt is to obtain the assent of his creditors to his applying for an order of discharge; he is to request the trustee to summon a meeting and to deposit a sufficient sum for costs. The provisions of that rule appear to have been followed in the present case. The bankrupt did all that was required of him by that rule, and it remained for the trustee to take the proper steps for summoning the meeting, Now what are the proper steps to be taken, including that which is supplied by the rules as to the summoning of a meeting by the trustee? Sects. 14 and 16 apply to the first general meeting, which is to be summoned by the Court. Sect. 20 provides for the summoning of subsequent general meetings by the trustee and by the Court. Then s. 21 provides that the provisions of the Act with respect to the first general meeting shall apply to any subsequent general meeting, with this exception (among others), that subsequent meetings may be summoned by the trustee. Then, if we turn to the rules to see how the trustee is to summon a meeting, we find it in rule 95, which provides that the trustee is to transmit a notice to each creditor of the time and place and the purpose of the meeting. It is not disputed that, in the present case, the trustee, having received the request of the bankrupt that he would summon a meeting, complied with the provisions of rule 95. *Primâ facie*, therefore, one would say that the trustee summoned the meeting in the way which the rules have pointed out. What, then, is the objection to the meeting? The opposing creditors say that regard must be had to s. 21, and that in other sections of the Act, or in other rules which give effect to them, there are certain provisions with regard to the summoning of the first meeting which have not been complied with in the present case. The only sections in the Act which refer to the first meeting are ss. 14 and 16. Sect. 14 only provides by whom the first meeting is to be summoned; there is nothing else in that section which can be extended by s. 21 to the summoning of subsequent

meetings, and that is expressly dealt with by s. 21. But when we come to s. 16, we find certain provisions which the legislature may well have intended should apply to other meetings than the first, and I think it cannot be doubted that the provisions of that section are, by s. 21, made applicable to every subsequent meeting, whether summoned by the Court or by the trustee. But it is urged on behalf of the opposing creditors that something more is rendered necessary as to the mode of summoning the meeting, and reference is made especially to rule 89. There can be no question, I take it, that, as regards the first general meeting, the notices in the *Gazette* and in a local paper which are mentioned in rule 89 are essential. Whether the advertisement is to be the act of the registrar or of some one else is not very material, but I observe that in the Form (No. 26) in the Schedule to the Rules the signature of the registrar is attached. It is said by the opposing creditors that the provisions of rule 89 apply to the general meetings subsequent to the first, just as much as any of the provisions of s. 16, and that we must regard rule 89 as if it had been inserted in the Act itself, and for this purpose reliance is placed on s. 78. It appears to me that that particular rule, which gives effect to s. 16, is, as regards the first meeting, made by s. 78 as binding as if it had been inserted in the Act. But then regard must be had to the other rules relating to the summoning of meetings, which are equally made of the same force as if they were in the Act. What are those other rules? Rule 11 applies to the summoning of a meeting by the Court under s. 20 subsequent to the first meeting, and it makes certain provisions essential. The meeting is to be summoned as the Court directs, but, unless the Court gives a particular direction, all that the registrar has to do is to send a sealed copy of the order for the meeting to the trustee, who is to send a copy of the order to each creditor at his address. If rules 11, 89, and 95, are all to be read as if they were inserted in the Act, we must endeavour to give a reasonable construction to them taken all together, and my conclusion would be that different provisions were intended to be made for the summoning of meetings, varying with the nature of the meeting. In the case of the first meeting there would be no list of the creditors in existence, and then it is provided

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that notice of the meeting is to be given by means of advertisements in the *Gazette* and in a local paper, because the names and addresses of the creditors would not be known to the person who has to summon the meeting. But, after a list of the creditors has been prepared by the bankrupt, and their names and addresses are known, care appears to have been taken by the rules that, instead of a general notice not addressed to any individual in particular, a notice of the meeting shall, as far as possible, be sent to each creditor at his address. I think it would be unreasonable to extend the meaning of the words "the provisions of this Act," in s. 21, beyond the provisions of the Act itself. But this is the conclusion at which I should have arrived even if the provisions of the rules had been inserted in the Act itself. In that case I think it would be a strained construction of s. 21 to hold that it made the provisions for the summoning of the first meeting by the Court apply to the summoning of subsequent meetings by the trustee, for which a distinct provision is made. Having arrived at this conclusion, it follows that the meeting in the present case was duly summoned, and the order appealed from was made only on the ground that the meeting had not been properly summoned. With all respect to the learned registrar who was only following a practice which had existed for fourteen years, now that the correctness of that practice is challenged, I am bound to say that I think it is not in accordance with the Act and the Rules. The appeal must be allowed, and the case must be referred back to the registrar to be dealt with on its merits. I think it is not desirable that we should make any order as to the costs now; I think the best course will be to leave them in the discretion of the registrar.

COTTON, L.J. The registrar has refused to enter into the question whether the bankrupt ought to have an order of discharge, on the ground that the resolution of the creditors, which is by s. 48 made a condition precedent to his application to the Court, was not an effectual resolution, not such a resolution as is required by the Act, by reason of the meeting not having been duly summoned. When we look at the rules which provide for the summoning of meetings, we find that rule 95 does in terms

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apply to the summoning of such a meeting, and that its terms have been complied with in the present case. That would seem to settle the question. But it is said that s. 21 imports the provisions of rule 89 for the summoning of the first meeting. Sect. 21 says that "the provisions of this Act" with respect to the first meeting shall apply to any subsequent meeting of the creditors in a bankruptcy. Now there is no provision in the Act itself as to the mode of summoning the first meeting, but we find that rule 89 does provide for that, and it is said that by virtue of s. 78 the provisions of rule 89 are imported into the Act, and are by s. 21 made to apply to a meeting of creditors summoned by the trustee under s. 48. In my opinion that is not so. Sect. 78 says that the rules are to be of the same force as if they were enacted in the body of the Act, but, in my opinion, that is not the same thing for the purposes of construction as if the rules had been actually inserted in the Act. No doubt rule 89 is just as binding as regards the summoning of the first meeting as if it had been in the Act itself, but that is not the same thing as saying that for the purposes of construction it is to be dealt with as if it had actually been in the Act. In my opinion, however, the result would be exactly the same if rules 89 and 95 had both been contained in the Act; even then the provisions of rule 89 would not apply to a meeting summoned by the trustee. The question then would be whether, when a special provision is made as to the mode of summoning a meeting called by the trustee, certain other provisions as to the summoning of the first meeting by the Court are imported by s. 21. I am of opinion that, even if both rules are to be treated as parts of the Act, rule 95 prescribes all that is necessary to be done when a meeting is summoned by the trustee. That rule does not say that when a meeting is summoned by the trustee he is to do the things mentioned in the rule; it says that when a meeting is summoned by the trustee it shall be summoned by his doing certain things, i.e., the meeting is to be summoned in that way. If the rule had said that, when a meeting is summoned by the trustee, he is to do certain things, it might well have been that those things were to be in addition to, and not in substitution for, the advertisments prescribed by rule 89. In my opinion,

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rules 89 and 95 prescribe two different modes of summoning meetings, and rule 95 contains everything which is necessary and effectual for the summoning of a meeting by the trustee, and it would be wrong to hold that any advertisements are necessary in the case of a meeting summoned by the trustee. I agree, therefore, that the appeal must be allowed, and the matter be referred back to the registrar.

LINDLEY, L.J. I am of the same opinion. The case really turns upon the true construction of s. 48, and the rules which have been framed to work out the provisions of that section. The rules which directly apply to the case are rules 138, 142, and 95. A bankrupt who desires to obtain an order of discharge before the close of the bankruptcy, must procure the assent of his creditors to his making an application to the Court for the purpose, and then he must apply to the registrar to fix a day for the hearing of his application. Rule 142 provides that in order to obtain the assent of the creditors the bankrupt is to request the trustee to summon a meeting, and it clearly imposes on the trustee the duty of summoning it. Then rule 95 says in express terms how a meeting is to be summoned by the trustee, and the provisions of that rule have been followed. Looking, therefore, at s. 48, and at the rules which are directly applicable, everything has been done which is required; there has been no mistake, no error, no slip of any kind. It is said, however, that, looking at the provisions of ss. 21 and 78, a notice of the meeting ought to have been advertised in the *Gazette* and in a local paper, as is required by rule 89 in the case of the first general meeting of creditors. I cannot agree in this view. I agree with Cotton, L.J., that s. 78 has not the effect of importing the Rules into the Act for the purposes of construction, and moreover that, even if rules 89, 95 are to be taken as incorporated in the Act, the result will be the same. There will then be a general rule applicable to all meetings, and a special rule applicable to meetings summoned by the trustee. In such a case the special rule must be followed in preference to the general rule. That is in accordance with the general well known rule of construction. I can quite understand that the practice of advertising meetings

of this kind may be a very useful one, but what we have to decide is whether the advertisement is a condition precedent to the validity of the resolutions. I cannot see my way to that conclusion.

Appeal allowed.

Solicitor for appellant: *W. Bagot Harte.*
Solicitors for opposing creditor: *Boulton, Sons, & Sandeman.*
Solicitor for trustee: *R. Raphael.*

W. L. C.

HOWELL *v.* DAWSON. DAWSON CLAIMANT.

May 1.

Practice—Interpleader Issue—Sale—Receiver and Manager—Judicature Act, 1873, s. 25, sub-s. 8, Order LVII, rule 15.

An interpleader issue being ordered to try the right to goods seized in execution, the Court or a judge may, under the Judicature Act, 1873, s. 25, sub-s. 8, and Order LVII., rule 15, order that, instead of a sale by the sheriff, a receiver and manager of the property be appointed.

APPEAL from chambers.

The plaintiff having recovered judgment and issued execution against the defendant for 85*l.*, the sheriff seized under the fi fa, four cabs, six horses, harness, &c., which were claimed by the wife of the defendant as her separate estate. An interpleader order for an issue to try the title to the goods having been obtained, an application was made to Butt, J., at chambers, that instead of the sale which would, under the order, be made by the sheriff, unless the money were brought into court, a receiver and manager might be appointed. The application having been refused, the claimant appealed.

English Harrison, for the claimant. The goods and chattels seized are used in the business of a cab proprietor. It is a going concern, and remunerative. If the cabs and horses are sold at a forced sale they will be sold below their value and the business will be stopped, but if a receiver is appointed they will continue earning money pendente lite. By the Judicature Act, 1873, s. 25, sub-s. 8, a receiver may be appointed by an interlocutory

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order of the Court "in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just." And by Order LVII, rule 15, the Court or a judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs "and all other matters" as may be just and reasonable. The present case is one in which this jurisdiction should be exercised.

Horne Payne, for the plaintiff, execution creditor, admitted the jurisdiction but contended that the order that the sheriff should sell was the common order invariably made since the Interpleader Acts and should not be disturbed.

[THE COURT. Why should there be a sale which will do great injury in this case?]

A receiver is expensive; but if the costs are not cast on the plaintiff, he will consent to the appointment of a receiver and manager. If the claimant wishes the business to be carried on it should be at her cost, and the receiver should give security.

Cock, for the sheriff, asked that he should be protected by the order.

THE COURT (Grove, J., and Huddleston, B.). Appeal allowed. A receiver and manager to be appointed at the claimant's expense. If the claimant succeeds on the interpleader issue, the execution creditor to pay the expenses of such receiver and manager. The receiver and manager to give security. No action against the sheriff, and no action against him with regard to his handing over to the receiver the goods seized.

Order accordingly.

Solicitor for plaintiff: *H. Montagu.*
Solicitors for claimant: *Baker & Nairne.*
Solicitors for sheriff: *Maynard & Burchell.*

J. R.

[IN THE COURT OF APPEAL.]

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April 8.

SVENSDEN AND OTHERS *v.* WALLACE BROTHERS.

Insurance, Marine—General Average—Expenses of re-shipping Cargo and of Ship leaving Port of Refuge.

A ship having during a voyage sprung a dangerous leak, the captain, for the safety of ship and cargo, put into a port of refuge to repair, where in order to repair the ship the cargo was necessarily landed:—

Held, by Brett, M.R., and Bowen, L.J. (Baggallay, L.J., dissenting), that the expenses of reloading the cargo after the ship had been repaired and of pilotage and port charges on the ship leaving the port were not general average expenses.

Atwood v. *Sellar* (4 Q. B. D. 342; 5 Q. B. D. 286) distinguished.

ACTION by the owners of a Norwegian ship against the owners of her cargo, which consisted of rice, for expenses claimed as general average expenses incurred in consequence of the ship having by reason of a tempest during her voyage from Rangoon to Liverpool sprang a dangerous leak, which obliged the captain for the safety of ship and cargo to put into Port Louis in the Mauritius to repair. When in port the cargo was necessarily landed in order to repair the ship, it was warehoused and after the ship had been repaired it was re-shipped. The ship was piloted out to sea and safely completed her voyage to Liverpool. The defendants, who were the owners of the cargo, admitted their liability to pay the warehouse rent of the cargo, and also to pay general average contribution in respect of the towage, pilotage, and port dues inwards, and in respect of the unloading of the cargo, but they disputed their liability to contribute towards the reloading of the cargo and the pilotage and port charges outwards.

Lopes, J., before whom the action was tried without a jury, gave judgment for the plaintiffs for all these disputed items (1), on the authority of *Atwood* v. *Sellar* (2), by which he considered the case was governed.

The defendants appealed.

(1) 11 Q. B. D. 616.

(2) 4 Q. B. D. 342; 5 Q. B. D. 286.

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1883. Dec. 13, 14, 15, 17. *Webster, Q.C.*, and *J. Gorell Barnes* (*Myburgh, Q.C.*, with them), for the defendants.

C. Russell, Q.C., and *Cohen, Q.C.* (*H. D. Warr*, with them), for the plaintiffs.

In addition to the authorities mentioned in the judgments the following were referred to:—*Duncan* v. *Benson* (1); Abbott on Shipping, 8th ed., p. 497; 12th ed., p. 508; *Wilson* v. *Bank of Victoria* (2); *Jackson* v. *Union Marine Insurance Co.* (3); *Powell* v. *Gudgeon* (4); *Benson* v. *Chapman* (5); *Mavro* v. *Ocean Marine Insurance Co.* (6); *Moss* v. *Smith* (7); Park on Marine Insurance, 7th ed., vol. i., p. 208; Benecke on Marine Insurance, ed. 1824, p. 191; Maclachlan's Merchant Shipping, 3rd ed., pp. 427, 428; *Worms* v. *Storey* (8); *De Cuadra* v. *Swann* (9); Baily on General Average, 2nd ed., p. 122; Phillip's Law of Insurance, sect. 1326; Arnould on Marine Insurance, 3rd ed., pp. 789, 966; *Kemp* v. *Halliday* (10); and Marshall on Marine Insurance, 4th ed., p. 426.

Cur. adv. vult.

BRETT, M.R. This was an action brought by the plaintiffs, owners of a Norwegian ship, against the defendants, owners of cargo on board, to recover a general average contribution in respect of expenses incurred. The facts stated to have been proved in evidence were as follows:—The cargo was shipped at Rangoon to be carried to Liverpool. During the voyage the ship by reason of a tempest sprung a dangerous leak; the captain, for the safety of ship and cargo, put into Port Louis, in the Mauritius, to repair. When in port it was necessary, in order to repair the ship, but not otherwise necessary, that the cargo should be landed, and it was landed; the cargo was warehoused; the ship was repaired; the cargo was reloaded; the ship was piloted out to sea; the ship arrived safely at Liverpool. Upon demand the defendants acceded to pay contribution in respect of the towage, pilotage, and port dues inwards,

(1) 1 Exch. 537.
(2) Law Rep. 2 Q. B. 203.
(3) Law Rep. 10 Q. B. 125.
(4) 5 M. & S. 431.
(5) 2 H. L. C. 696.
(6) Law Rep. 9 C. P. 595.
(7) 9 C. B. 94.
(8) 11 Exch. 427.
(9) 16 C. B. (N.S.) 772, and p. 795.
(10) 6 B. & S. 723.

and in respect of the unloading of the cargo, and admitted their liability to pay the warehouse rent of the cargo, but refused to contribute towards the reloading of the cargo, or the pilotage or port dues outwards. The items in dispute therefore in the action were the items charging contribution in respect of the reloading, and the pilotage and port charges outwards. The case was tried before Mr. Justice Lopes without a jury, and the learned judge gave judgment in favour of the plaintiffs for all and each of the items in dispute, on the ground that the case was governed by the decision in *Atwood* v. *Sellar* (1), either as being directly within the decision in that case, so as to bind this Court now, or as being within the principles on which that case was decided.

It is to be remarked that in this case the original damage was caused by perils of the sea; that the first act of sacrifice was the incurring of expenses in taking the ship and cargo into port for the safety of both ship and cargo; that the unloading of the cargo was necessary in order that the ship might be repaired, but not necessary on account of any danger of damage to be suffered, or of any damage already incurred, by the cargo; that the warehousing was probably necessary for the safety of the cargo; that the reloading and outward expenses were necessary for the purpose of carrying the voyage to a successful termination.

It was contended before us on the part of the plaintiffs that the case was completely bound by the decision in *Atwood* v. *Sellar* (1), because the putting into port to repair in this case was a general average act, and all the subsequent acts were the consequences of that act, just as much as all the acts subsequent to cutting away the mast were the consequences of that act in *Atwood* v. *Sellar*. (1) It was further contended that if the case was not absolutely bound as by the authority of, yet it was within the principles on which the judgment in, *Atwood* v. *Sellar* (1) was based. It was argued that there is no distinction between the cases of a ship putting into a port of distress for the safety of both ship and cargo after a damage in itself a general average sacrifice, or after a damage caused by perils of the sea or other accident; and that in all cases all such items as were in dispute in this action must follow the decision in *Atwood* v. *Sellar*. (1)

(1) 4 Q. B. D. 342; 5 Q. B. D. 286.

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It was contended on behalf of the defendants that none of the disputed items could entitle the plaintiffs to a general average contribution, because they were incurred in order to enable the plaintiffs to earn their freight, and were incurred when neither ship nor cargo was in danger.

In order to support the argument on the part of the plaintiffs, Mr. Russell enunciated the following proposition as governing all questions of general average expenditure. The proposition, he said, which is affirmed by the decision in *Atwood* v. *Sellar* (1), is, that all extraordinary expenses are to be allowed as matters for general average contribution, which were reasonably incurred for the benefit and safety of the whole adventure, or were the reasonable and natural consequences and results following upon an act done in view of danger to the whole adventure, and for the benefit of the whole adventure. If this is a true proposition, in the sense in which it was intended by Mr. Russell that it should be accepted by us, it rules the case in favour of the plaintiffs. In order to determine whether we can adopt it in that sense, it is necessary to criticise it very carefully. It does not speak of expenses incurred merely for *safety* or *preservation*, but for *benefit and safety*. It does not speak of safety of *ship and cargo*, but of safety of *the whole adventure*. It does not speak of the expenses of an act of sacrifice done for safety, or of expenses incurred for safety, but of expenses *which were the reasonable and natural consequences and results following upon an act done for safety*. If "benefit" means the same as "safety," the phrase in which the word is used is tautologous; if benefit means more than safety, we must determine whether any other benefit than that of safety can be vouched in order to sustain a claim for general average. If by "the *whole adventure*" is meant only "ship, freight, and cargo," it is but an equivalent phrase for "ship freight and cargo"; but if more is meant, if it is intended to bring in a benefit to "the adventure of carrying the goods to their destination," we must determine whether such larger meaning can be recognised. We must further determine whether the description of the expenses which may be brought into account is not too expansive. It was urged that even if the

(1) 4 Q. B. D. 342; 5 Q. B. D. 286.

proposition is stated in terms larger than have hitherto been recognised in English law, yet it ought now to be adopted in order to bring the principle of English law on the subject into consonance with the laws of all other countries. But to this I cannot agree. It is useless to inquire whether the law is, as stated, the same in all European countries. For if it is, yet no English Court has any mission to adapt the law of England to the laws of other countries; it has authority only to declare what the law of England is. And even if we could do what is suggested, I should doubt the expediency of making the law of the greatest commercial and maritime country in the world bend to the law of other countries where commercial operations are far less extensive, and where commercial adventure is far more timid. As to the cognate law of America, it has been declared over and over again, that the English and American Courts have diverged upon this particular head of law, the law of general average. The question therefore must be, what is the law of England in this matter. The governing principle or proposition, which has been adopted in its terms by a succession of English Courts as the true statement of the governing principle, is that which was stated by Mr. Justice Lawrence in *Birkley* v. *Presgrave*. (1) It has been considered to be one of the many happy expositions of mercantile law made by that learned person, in terms so broad and yet so accurate, as shew that he was one of the greatest mercantile lawyers who has ever adorned our profession in this country. His proposition is thus expressed: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested." This proposition, read with regard to expenses, will read thus: All loss which arises in consequence of extraordinary expenses incurred for the preservation of the ship and cargo comes within general average. But the loss which arises from an expense is the expense itself. Therefore we must read thus: Every expense incurred for the preservation of the ship and cargo comes within general average. Applying this rule in its ordinary sense to each item successively claimed as an item of

(1) 1 East, 220.

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expenditure in respect of which a general average contribution in any given case is due, the question must be: was this item of expenditure, at the moment it was incurred, incurred for the safety of both the ship and cargo? The word "benefit" is not used by Mr. Justice Lawrence, but it is used by Lord Kenyon in the same case. He says: "for the benefit of the whole concern." But the word "benefit," thus used by him with regard to the same facts in the same case in a judgment agreeing with the judgment of Mr. Justice Lawrence sitting by his side, must have been intended to mean the same as the word "preservation" used by that learned judge. The words have been usually used as equivalent. Thus, Mr. Arnould, in stating the definition of a general average loss, says: "A general average loss may be defined to be a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred for the joint '*benefit*' of ship and cargo." And for his authority he cites: "per Lawrence, J., in *Birkley* v. *Presgrave*" (1), where the word used is "preservation." In almost the next sentence, Arnould says: "In order to entitle the party sustaining such loss to a general average contribution, it must appear to have been incurred with a view to the general *safety* of the whole adventure, i.e. of the ship, cargo, and freight." It is obvious on reading Arnould that he constantly uses the words as equivalent. And so have many judges from time to time. Mr. Russell used the word "benefit" in his argument as having in his proposition a larger meaning than "safety" or "preservation," and therefore his proposition is in this respect intended to be, and is larger than the proposition of Mr. Justice Lawrence. Again Mr. Justice Lawrence says: "for preservation of '*ship and cargo;*'" but Mr. Russell says: "*for the whole adventure.*" Lord Kenyon speaks of "the whole concern." Arnould speaks of "the whole adventure, i.e. of the ship, cargo, and freight," thus giving his own equivalent. The point was distinctly argued in *Job* v. *Langton*. (2) Mr. Mellish says: "It is contended on the other side, that all extraordinary expenses incurred for the preservation of the *whole maritime adventure, that is, for bringing the ship and goods safely to their destination,* are general average. That is too wide a proposition." Mr. Blackburn argues: "The primary object is the *arrival of the*

(1) 1 East, 220. (2) 6 E. & B. 779.

ship with her cargo at her destination. Ordinary acts done to bring *this* about are done by the shipowner as part of his duty; but extraordinary acts done *for this object* give rise to general average." Lord Campbell, dealing with this contention, says: "Mr. Blackburn's position, that the end in view of every maritime adventure being the *arrival of the ship with her cargo at her destination,* extraordinary acts done *to effectuate this* give rise to general average, would justify him in contending that these expenses do not constitute particular average; but unfortunately for him the expenses incurred in repairing the ship would according to this reasoning equally be general average." In that case therefore, the point being distinctly raised, it was determined that the use of the phrase for the benefit of "the whole adventure," with the meaning given to it as used in his own proposition by Mr. Russell in his argument in this case, is contrary to the law of England. Here again, therefore, the proposition of Mr. Russell is too large. Again Mr. Justice Lawrence speaks of every expense *incurred for the safety* of the ship and cargo, meaning, as I have said, that the question as to each separate item claimed must be: was this item of expenditure, at the moment it was incurred, incurred for the safety of both ship and cargo? But Mr. Russell says all extraordinary expenses which were reasonably incurred for the benefit and safety of the whole adventure, or *were the reasonable and natural consequences and results* following upon an act done in view of danger," &c. The question under this as to an item would be, was this item of expenditure a reasonable and natural result in the ordinary course of business following upon some other act of sacrifice or some other act of expenditure? The difference is, that under the rule of Mr. Justice Lawrence no act or item of expenditure could be allowed which was not itself directly done or incurred for the preservation of the ship and cargo; whereas under Mr. Russell's rule an expenditure would be allowed, which itself was not incurred for the preservation of the ship and cargo, if in the usual and natural course of business it would be incurred after some act of sacrifice done or some other act of expenditure incurred, which act was done or which other expenditure was incurred, directly for the safety of ship and cargo. It is obvious that the proposition of Mr. Russell is larger than

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the rule of Mr. Justice Lawrence. But if the proposition of Mr. Justice Lawrence is the true and accepted law of England, as I think it is, no Court now existing has power to alter that principle while it is the law. We must reject the proposition suggested in argument and abide by the proposition decided in judgments.

We have to apply the rule, as stated by Mr. Justice Lawrence, to the case of a ship putting into a port of distress for repairs in consequence of damage done by sea perils. If there is danger to the preservation of both ship and cargo from destruction, if the ship remains at sea, the act of putting into port to repair is an extraordinary act which may well be called a general average act. In order to do that act, an expenditure is reasonably incurred, that expenditure is a general average expenditure. If in order to do that act, towage, pilotage, or inward dues must be paid, those expenditures are all and each general average expenditures. When the ship is in the port of distress for repair, other acts are often done, and other expenditures are often incurred, which must each be considered. Each of these must be considered as if it were the sole act or expenditure, and also whether it may be treated as a part of another act or expenditure. When the ship is in the port of distress, it often happens that the cargo is unloaded and warehoused or otherwise protected, and if necessary manipulated; the ship is repaired, the cargo is reloaded, the ship is taken out to sea and proceeds on her voyage. When the ship and cargo are in the port, both may still be in danger of destruction, or the ship alone, or the cargo alone. If both ship and cargo are in danger, it is impossible to conceive, as a fact, that anything which can substantially be called repairs can be done to the ship whilst the cargo is in her. The cargo must then be landed for the safety of both. But the ship alone may be in danger, as for instance, of breaking her back on a falling tide if the cargo be left in her, though the cargo, from its nature, would not be in danger. In such a case the cargo must be landed solely for the safety of the ship. The cargo alone may be in danger, as if the injured ship be on the ground and safe, but the cargo be perishable if wetted; then the cargo must be landed, but solely for the safety of the cargo. Or it may be necessary to land the cargo, though neither it nor the ship be in immediate danger, or

though the ship only be in danger, because the injury to the ship cannot be repaired without the removal of the cargo. In the first case the cost of unloading, treating the unloading as within itself the sole act done, is clearly a general average expenditure. In the second, third, and fourth cases the expenditure, treated as if it were the cost of the sole act done, cannot be a general average expenditure. But we must consider whether any of the three can be treated as part of another act which is a general average act. The only act to which they can be referred is the act of going into port to repair. In the second and third cases which arise, whether the repairs to the ship could or could not be done as a matter of carpentering without the cargo being removed, it cannot be truly said that the landing of the cargo is a part of the act of going into port to repair. In the fourth case, if you take the act of sacrifice to be not merely the going into port, but the going into port to repair, and if the one act be the going in to repair, and the repair cannot be done without the landing of the cargo, which is the hypothesis, then the landing of the cargo is a part of the act of going into port to repair. It is a part of the act which is done in order to put the ship into such a position that she can be repaired, which is the real meaning of the colloquial maritime phrase, "going in to repair." The expression then is going in for repairs. The real accurate meaning is going in to be repaired, or going in so as to be in a position which will enable her to be repaired. The landing of the cargo in such case is upon the hypothesis so necessary a part of the act of taking the ship into port so as to be in a position to be repaired, that such act cannot be said to be usefully completed until the cargo is landed. This fourth case has always been treated as if the going into port to repair was one act, and as if that were the one act of sacrifice. The cost of unloading has consequently in such case always been allowed as a general average expenditure. Treated in this way, which seems to be a not unreasonable way of treating the case as matter of business, the allowance of the item is not against the principle of law, and therefore is rightly allowed. When the cargo is landed, it may or may not, according to its own nature, or the circumstances of the locality, require to be warehoused or otherwise protected. It may, in consequence of partial damage

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already suffered, or from its own nature, require for its own safety to be manipulated, as, for instance, to be unpacked or dried; but such acts cannot possibly be necessary for the safety or preservation of the ship. She is at that moment safe or unsafe. But these acts cannot contribute in any way to her safety if she is unsafe. They cannot be said to be a part of the act of going into port to repair, they have no reference to the act of repairing, or of putting the ship into a position in which she can be repaired. They are therefore not within the principle. The repairing of the ship has nothing to do with the safety of the cargo. It is done in respect of the ship alone. The reloading of the cargo and the outward expenses are expenses of acts done when both ship and cargo are safe from existing danger, and are therefore not within the rule. They cannot be said to be a part of the act of placing the ship in a position to be repaired. Unless, therefore, we are bound by authority to hold otherwise, I am of opinion that according to the law of England when a ship is obliged, for the safety of ship and cargo, to go into and goes into a port of distress in order to repair damage done by sea-peril, the expenses of going into the port are general average expenses; that if it is necessary for the safety of both ship and cargo to unload the cargo, or if it is necessary to unload the cargo in order to repair the ship, though it is not necessary for the safety of the cargo, the expense of unloading the cargo is a general average expense; but if the unloading of the cargo is not for either of these causes the expense of unloading is not a general average expense. I am of opinion, in the same way and in the same case, that the expenses of warehousing, guarding, or manipulating the cargo, of repairing the ship, of reloading the cargo, of taking the ship out of port, of the charges of going out of port, are not general average expenses. It is said, however, that we are bound by the decision of the Court of Appeal in *Atwood* v. *Sellar* (1), or that we ought to decide this case according to the principles on which that case was decided. And if within ordinary rules that case binds us, I will not hesitate to obey it, though with deference I could not have agreed with it. In that case the vessel was obliged to put into port in order

(1) 4 Q. B. D. 342; 5 Q. B. D. 286.

to repair the loss of a mast cut away in severe weather, in order then to save the ship and cargo from immediate danger. "The question," says the judgment, "is whether in the case of a vessel going into port in consequence of an injury which is itself the subject of general average, the expenses of warehousing and re-loading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are the subject of general average also." "We have therefore," it is afterwards said at p. 294, "the law, as laid down by the Courts for a considerable portion of the period over which the practice of average adjusters stated in the special case extends, running counter to that practice, by recognising, as regards port of refuge expenses, a distinction between cases where a ship puts into a port of distress for repair of damage caused by a voluntary sacrifice, and cases where it puts in for repair of damage caused by peril of the seas." "It is not necessary," it is said at p. 297, "for us to decide in the present case whether *Hall* v. *Janson* (1) was rightly decided, and whether the expenses in dispute in the present case would properly belong to general average if the original cause of damage to the ship had only been a cause belonging to particular average." After these quotations it is impossible, in my opinion, to say that the decision in that case binds us by authority in this case. The Court expressly stated that it did not decide what would be the law applicable to a case like the present. I purposely abstain from entering into all the observations made in the judgments of Cockburn, C.J., in 4 Q. B. D., and Thesiger, L.J., in 5 Q. B. D. I do not think that the real ground of the decision in *Atwood* v. *Sellar* (2) in the Court of Appeal was that all the acts done in a port of distress are one continued act. What is the one act? By what name can it be expressed? Warehousing the cargo, re-loading it, going out of port, cannot be said to be parts of the act of taking the ship into port in order to enable her to be repaired. Reloading the cargo and taking the ship out of port, when the ship is repaired, cannot be parts of the act of repairing the ship. The real ground of the decision was, I

(1) 4 E. & B. 500; 24 L. J. (Q.B.) 97.
(2) 4 Q. B. D. 342; 5 Q. B. D. 286.

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think, that where the putting into port for repairs is the necessary consequence of a previous general average sacrifice, the law of England is as elastic in respect of the subsequent acts done and expenses incurred in the port as the American and other laws are stated to be in all cases of a ship necessarily putting into a port of distress to repair. And for that proposition there were before the decision in *Atwood* v. *Sellar* (1) many weighty dicta by English authors of authority and English judges; but all which dicta drew a distinction between the going into a port of distress in consequence of a voluntary sacrifice, and of putting into port in consequence of a particular average damage. I adopt that distinction, because I do not think that we are bound in the present case by the decision in *Atwood* v. *Sellar* (1), and the propriety of that decision with reference to the facts on which it was decided, we are not at liberty to question. I have carefully examined all the cases cited to us. I do not think that any of them are decisive of the case before us. I therefore think it useless to enter, in this judgment, into a minute discussion of them. I have looked carefully into valuable books written by great average staters, but cannot accept their views on either side as authority. No one can study the law successfully without reading them. No one can give judgment without referring to them for valuable aid, but they must not rule the decisions of Courts as by authority. The only further reference I think it useful to make to former cases is, that in my opinion the decisions in *Da Costa* v. *Newnham* (2) and *Moran* v. *Jones* (3) cannot be supported. I am of opinion that the appeal should be allowed, and that judgment should be entered for the defendants.

BAGGALLAY, L.J. I have had an opportunity of perusing and considering the judgment which has just been delivered by the Master of the Rolls, and also that which will presently be delivered by Bowen, L.J., and I regret that I am unable to agree with them in thinking that this appeal should be allowed. I regret it, because I deem it very undesirable that so important a principle as that which will be affirmed by their judgments should

(1) 4 Q. B. D. 342; 5 Q. B. D. 286.
(2) 2 Term Rep. 409. (3) 7 E. & B. 523.

have any doubt thrown upon its soundness, by reason of any dissent on my part from the views expressed by them. I am very sensible that in saying this I am attributing too much importance to my own views upon a subject with which they are much more familiar than I am; but having been a party to the judgment delivered by Thesiger, L.J., in *Atwood* v. *Sellar* (1), which was the subject of much consideration by the judges on whose behalf it was delivered, and having, since the arguments on this appeal were concluded, carefully reconsidered that judgment, I feel bound to express the opinion at which I have arrived, and to state concisely the reasons by which I have been influenced in forming that opinion. In doing so I propose, in the first place, to compare the circumstances under which the decision in *Atwood* v. *Sellar* (1) was arrived at with those with which we have to deal on the present appeal; for conciseness and convenience of comparison I will refer to the ships as *A.* and *B.*, and will deal with them as having encountered the same storm and as having sought the same port of refuge. The circumstances may be then stated as follows: two ships, *A.* and *B.*, each on a voyage from a foreign port to Liverpool, and having a valuable cargo on board, encountered a violent storm; the master of *A.*, to avoid a more serious injury, cut away one of his masts; *B.* sprung a dangerous leak; both, *for the safety of ship and cargo*, put into a port of refuge *to repair the injuries they had sustained;* to effect such repairs and to enable the ships to prosecute their respective voyages, it became necessary in the case of each ship to discharge the whole or a portion of her cargo; in addition to the port dues and other expenses incident to her entering the port, further expenses were incurred in respect of each ship in unloading, warehousing, and reloading her cargo whilst she remained in port, and for pilotage and other charges on leaving the port to prosecute her voyage.

The only difference between the circumstances of *A.* and those of *B.* was in the nature or character of the injury, which occasioned her putting into port. The cutting away of one of the masts of *A.* was the subject of general average; in other words, her putting into the port of refuge was occasioned by *a general average sacrifice;* whilst the putting into port of *B.* was occasioned by her

(1) 4 Q. B. D. 342; 5 Q. B. D. 286.

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springing a dangerous leak, which was *a particular average loss*. But in each case the putting into port *for the safety of ship and cargo* was an act of sacrifice, giving rise to claims for general average contribution; in the case of *A.* this act of sacrifice followed, or was a continuation of, the original act of sacrifice, whilst in the case of *B.* it was itself the original act of sacrifice; in each case the proximate cause of the extraordinary expenses incurred was the putting into the port of refuge.

If it had been left to average adjusters, previously to the decision in *Atwood* v. *Sellar* (1), to adjust the losses in respect of the expenses incurred by the two ships, they would, in accordance with a practice of many years' duration, have dealt with them as follows: in respect of each ship they would have treated the expenses incurred in entering the port and of discharging the cargo as *general average*, those incurred in warehousing the cargo as *particular average on the cargo*, and the pilotage and other charges incidental to leaving the port as *particular average on freight;* the fact that in the case of *A.* the putting into port was occasioned by a general average sacrifice, whilst in the case of *B.* it was occasioned by a particular average loss, would in no way have affected the adjustment of the losses incurred by reason of the putting into port; and properly so, if I am correct in the view which I have expressed, that in each case the putting into port was an act of sacrifice and the foundation of a claim for general average contribution.

That the practice of the average adjusters was based upon the principle that the putting into port to refit is in itself an act of sacrifice, is evidenced by their treating the expenses incidental to entering the port of refuge and of discharging the cargo as the subject of general average contribution; upon no other principle could the practice be supported. But the decision in *Atwood* v. *Sellar* (1) established that, whilst the practice of the average adjusters was in accordance with legal principles, so far as it treated the expenses of entering the port of refuge and of discharging the cargo as the subject of general average contribution, it was erroneous in the case of *A.* in limiting the expenses, which were the subject of general average contribution, to those last

(1) 4 Q. B. D. 342; 5 Q. B. D. 286.

mentioned, and that the expenses of warehousing and reloading the cargo and those incidental to leaving the port were equally the subject of general average contribution. But if, in the case of *A.*, the expenses of warehousing and reloading the cargo and of leaving the port were properly held to be the subject of general average contribution, I am unable to suggest any reason, satisfactory to myself, why the like principle should not be applied in the case of *B.*; in that case the expenses of unloading, warehousing, and reloading of the cargo and the coming out of port were as consequent upon the putting into port as they were in the case of *A.*; if they ought not to be treated as the subject of general average contribution in the case of *B.* they ought not, according to the view which I take of the circumstances of the two cases, to have been so treated in the case of *A.*

It has been pressed upon us in argument that in the judgment which was delivered in *Atwood* v. *Sellar* (1) care was taken to avoid intimating any opinion as to how a case similar to that now under consideration should be dealt with; I cannot assent to this view of the scope of the judgment; it is doubtless true that it was not intended to express any decided opinion upon the question referred to, but attention is distinctly directed (see p. 289) to the case of a ship which has been damaged by perils of the sea and has subsequently put into a port of refuge, and a distinction as regards any claim to general average contribution is drawn between a case in which the goods are unshipped and in safety, and the common danger consequently at an end, before the ship puts into port, and one in which the goods are not unshipped until after the ship has put into port, and in which there is consequently a common danger at the time when the ship put into port. And similar views are indicated in the comments upon the case of *Job* v. *Langton.* (2) For the reasons which I have thus concisely stated, I am of opinion that Lopes, J., arrived at a correct conclusion, and that the appeal should be dismissed.

Bowen, L.J. This case raises the important question whether certain port of refuge expenses incurred by a vessel which, in

(1) 4 Q. B. D. 342; 5 Q. B. D. 286.

(2) 6 E. & B. 779.

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consequence of a particular average loss has put into port to repair, are properly a subject of general average contribution. The plaintiffs are the shipowners and the defendants the owners of cargo. The vessel in her voyage from Rangoon to Liverpool met with heavy weather, and sprang a dangerous leak. The captain, for the sake of the preservation of ship and cargo, took refuge in the Mauritius, and was there compelled, in order to prosecute his voyage, to execute certain repairs upon the ship. In order to enable such repairs to be made the cargo was landed, warehoused, and reloaded, after which the vessel sailed for Liverpool. The expenses of unloading cargo have been accepted by the defendants as the subject of general average contribution, and the defendants have admitted their liability to pay the whole storage or warehouse rent of the cargo. The action was brought to recover general average contribution from the cargo in respect of its reloading, and port charges, pilotage, and other claims subsequent to the reloading. The cause was tried before Lopes, J., who held that the plaintiffs were entitled on all of the items in question to succeed, and this appeal is brought from his judgment in their favour.

It is essential at the outset to bear in mind two things, the nature of every general average sacrifice, and the object of every general average contribution. A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo. There is no difference in principle between a mast voluntarily cut away, an extraordinary expenditure voluntarily incurred, and extraordinary loss of time and labour voluntarily accepted, provided that in each case the sacrifice is made for the common safety in a time of danger. Next as to the object of general average contribution. It is to indemnify the person making the general average sacrifice against so much of the loss caused directly thereby as does not fall to his own proportionate share. This pro ratâ indemnity will not be complete without including in the calculation expenses which, though not themselves within the definition of voluntary sacrifice, nevertheless are directly caused by a voluntary sacrifice, and must therefore be recouped if the loss which the sacrifice causes is to be borne pro ratâ. "All loss," says Mr. Justice

Lawrence, in the case of *Birkley* v. *Presgrave* (1), " which arises *in consequence* of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested.

The question whether extraordinary expenditure after the entry into a port of refuge is rightly chargeable to general average, necessarily depends on the circumstances of each case. Each item of expenditure which is challenged must be considered on its own merits with reference to two tests. The first test is whether such item itself fulfils, as against some or all of the interests to be considered, the definition of a general average sacrifice; the second is whether such item, though not itself a general average sacrifice, is nevertheless an expenditure caused or rendered necessary by one. No supposed conveniences of calculation and no practice of average adjusters can justify taking one man's money to pay what by law is another man's individual loss. It has, however, been urged by the respondents' counsel that a more liberal view ought to be taken of the principles that regulate general average: and in particular with regard to port of refuge expenses. It is not necessary, it has been argued, that the expenditure or sacrifice should have been made for the common safety of ship and cargo, if it is made for the benefit of both, and in order to enable the vessel to bring her voyage and the common adventure to a successful issue. This doctrine has been advocated by various writers, and has engrafted itself upon the law of more than one foreign country; but whatever its theoretical value, it is not the law of England (see *Harrison* v. *Bank of Australasia* (2)). Exceptional cases, such as those suggested in the judgments delivered in *Job* v. *Langton* (3) and *Walthew* v. *Mavrojani* (4) may be imagined in which the safety of the ship and cargo, and the safety of the common commercial enterprise would be almost convertible terms, and with reference to such cases it is possible to conceive that expenses after the ship and cargo were in safety from the sea, might on the ground of a physical danger common to both, be brought into

(1) 1 East, 228.
(2) Law Rep. 7 Ex. 50.
(3) 6 E. & B. 779.
(4) Law Rep. 5 Ex. 116.

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general average. But (exceptional cases apart) it is not sufficient, according to English law, that an expenditure should have been made to benefit both cargo-owner and ship-owner. The idea of a common commercial adventure as distinguished from the criterion of common safety from the sea, would lead to the inclusion in general average of, at all events, temporary repairs of the ship caused by particular average loss, and would enable the shipowner to complete his part of the contract of affreightment by means of a money contribution levied perforce upon the cargo-owner. The chief English case of note in which language occurs that seems at first sight to favour the notion that a common adventure is the true criterion, is *Hall* v. *Janson* (1), where it was held that the unloading and reloading of cargo, for the sake of effecting repairs upon the ship, might give rise to a liability to contribution on the part of freight. Since freight perishes, if the voyage is frustrated, it may not have been unreasonable to hold that freight ought to contribute to the expenses incurred in unloading and reloading a cargo, the unloading of which is solely undertaken for the sake of repairing the ship. This limited proposition, with which alone *Hall* v. *Janson* (1) was concerned, by no means warrants the conclusion that the cargo ought in turn to contribute whenever any expenditure is incurred, not of saving the vessel and its contents, but merely for the sake of prosecuting the voyage. In the subsequent case of *Walthew* v. *Mavrojani* (2), the English doctrine has been restated and explained, and the language of the Court in *Harrison* v. *Bank of Australasia* (3) is to the same effect. We have been asked on another and a different principle to depart from the strict English theory in favour of port of refuge expenses following upon a particular average loss, upon the ground that they all form part of a continuous operation, the whole of which was contemplated by the captain at the time when he put into port. The intentions of the captain are no doubt material in considering the question whether the act done by him was performed only for the benefit of his ship, or for the common preservation of both ship and cargo. But it does not follow because his intentions

(1) 4 E. & B. 500; 24 L. J. (Q.B.) 97. (2) Law Rep. 5 Ex. 116.
(3) Law Rep. 7 Ex. 50.

are examinable to this extent, that everything which the captain intended in his own mind to do after common safety should have been attained, also ought to be chargeable to general average. Intentions which go beyond what is needed for common salvation only shew that in addition to intending that which was a general average sacrifice, it was intended further to do something which was not a general average sacrifice, nor directly caused by one. On such a ground repairs of the ship in port ought themselves to be included, for the captain probably intended these: though he intended them as a means not of saving the cargo, but of earning his own freight. In my opinion the two tests which I have enunciated cannot be qualified or extended so to embrace any such considerations.

The next step is to apply these two tests to the case before us, the damage which the vessel here received, and which compelled her to put into a port of refuge, being a particular average loss. And, first, as to the expenses of putting into port. Two views may theoretically be taken of the act of putting into port in a case like the present, though such expenses are now universally accepted as general average charges. These expenses might conceivably be considered as an exception to the general law, in virtue of which exception, though the bearing up for port was not a general average act of sacrifice in itself, its expenses are, for the sake of public policy, universally recognised as a subject-matter of contribution. The other and more general view is, that the bearing up for a port is to be treated as an act of general average sacrifice, because it is undertaken as a rule in the hour of danger for the common safety of ship and cargo (Benecke, p. 192). For the purpose of the present argument, I will assume that the latter view, which was pressed upon us by the respondents' counsel is the more correct. We come then to the unloading of cargo when the port of refuge has been reached. In practice, it has in recent times become common to carry these unloading expenses to general average, both where the repairs of the vessel have been rendered necessary by a general average act and where they are rendered necessary by a particular average loss. Nor is it necessary to discuss a practice which may have become inveterate and which is found adequate. Still, if strict

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theory were to be in each case relied upon, such unloading ought, as it seems to me, to be dealt with specifically in every instance by applying to it the two tests I have named. If necessary for the common preservation of both ship and cargo, the unloading will be in itself a general average sacrifice: see *The Copenhagen*. (1) If not so necessary, it will not in itself amount to a general average sacrifice at all, but it may nevertheless be properly included as a subject-matter of contribution whenever the expenditure is directly caused by some antecedent act of general average sacrifice.

It has been maintained by some that the unloading, which is effected to enable the ship to be repaired after a particular average loss, may properly be treated as an act done for the common safety of ship and cargo, on the ground that if the cargo were not unloaded, ship and cargo would both be locked up indefinitely, and the voyage placed permanently in suspension. Reserving to one's self the right to consider any special circumstances in other cases arising from the character of the cargo or otherwise that might render unloading necessary for the preservation of both cargo and ship within the meaning of such test, I am unable to adopt the theoretical view that unloading becomes an act of sacrifice simply because it releases cargo and ship from the dead-lock that would otherwise ensue. Physical safety has been attained, and it appears to me to be the duty of the shipowner under his contract of affreightment either to proceed with his voyage or else to land his cargo, unless it is to be transhipped direct. In the case of *Plummer* v. *Wildman* (2), the unloading of the cargo, which was necessary for the repairs, was charged to general average, but in that case the repairs, owing to an antecedent sacrifice which necessitated them, were *themselves* held to be general average. In the case of *Hall* v. *Janson* (3), where the unloading was spoken of as chargeable to general average, the question at issue in the action was as to the liability to contribute not of cargo but of freight. In the present case the unloading expenses have been by common consent and in conformity with a very common practice dealt with as the

(1) 1 Chris. Rob. 289. (2) 3 M. & S. 482.
(3) 4 E. & B. 500; 24 L. J. (Q.B.) 97.

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subject of general average contribution, and it is therefore unnecessary to decide what would be in other cases the law on the point.

The goods having been landed there is an end of all danger common to ship and cargo. The contest between the parties in the present instance turns wholly on items of expenditure subsequently incurred. These cannot be brought into general average on the ground that they are general average sacrifice in themselves, for the hour of danger and of sacrifice is over. They can only become so chargeable if it can be shewn that they are part of the loss which some antecedent act of sacrifice entails. The first item in controversy which we are asked to consider relates to the warehousing of the cargo. Now primâ facie warehousing the cargo is a charge that ought to be borne by the cargo, which benefits exclusively by it. It may, conceivably, in some cases have been rendered necessary by an antecedent sacrifice so as to fall within the definition of the loss caused thereby. But the only antecedent sacrifice in the present case was the putting into port for refuge, and it is difficult to see how as between ship and cargo the warehousing of the cargo was caused by the mere putting into port. The defendants have admitted their liability to bear the charge in full. In my opinion there is no reason to treat the warehousing in the present case as other than a charge on cargo. We come next to the reloading. Reloading is not an act of sacrifice, for long before it occurs both ship and cargo are safe. Is it then caused by any act of sacrifice, or is it part of the loss, in other words, which an antecedent act of sacrifice involves? Where, for example, a ship has cut away a mast and has put into port to repair the damage so caused, and been compelled, in order to repair this special damage, to unload and to reload the cargo, it may follow, according to the decision in *Atwood* v. *Sellar* (1), that such expenses are all part of the loss involved in the original sacrifice. But in the present instance the only sacrifice has been the putting into port, and the reloading expenses are not part of the loss which putting into port has caused, but a loss caused by the captain's decision to repair his ship and to unload and reload the cargo for that purpose. The charges of reloading in such a case ought in

(1) 4 Q. B. D. 342; 5 Q. B. D. 286.

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principle to fall upon the freight, or else upon the freight and the ship together if the two interests are severed.

I come next to the charges outward, and this seems to me to raise a more difficult question. Expenditure of this description is not in itself a general average sacrifice, but may it not be said that it has been caused by one, on the ground that a ship which goes into port will have to come out again, and that the former operation directly causes the latter? If strict theory is to be applied there might seem to be a difference between the cases in which the vessel has done nothing in the port of refuge beyond availing herself of a temporary shelter and the cases where she puts in, in order to repair damage and because it was not safe for her to continue her voyage without such repairs. In the former case, where shelter alone is sought the vessel might plausibly be said to come out simply because she previously went in. In the latter case, where she puts in for repairs, the proximate cause of her coming out is not that she put in—for she could not have resumed her voyage had not the necessary repairs been effected upon her while in harbour—but that the master when in harbour decided, in the discharge of his duty and in the interest of his owners, on repairing the ship, reloading the cargo and carrying on the voyage. The outward expenses ought therefore, as it seems to me, in the present instance to fall on freight.

I proceed, lastly, to consider the authorities with a view of inquiring whether any of them are inconsistent with the conclusions at which I have arrived above. The authority of *Da Costa* v. *Newnham* (1), has been so shaken by subsequent decisions that it cannot any longer be relied on. In *Plummer* v. *Wildman* (2) the question arose as to repairs and disbursements. The vessel had met with a collision which broke her false stern and her knees, and the master was in consequence obliged to cut away part of the rigging of her bowsprit and to return to port to repair the damage sustained by the accident and the cutting away. The ship could not have prosecuted her voyage nor kept the sea with safety without returning and repairing in Jamaica. On her return thither the cargo was relanded and warehoused in order that such temporary repairs might be done as would enable her to prosecute her voyage, and part of the disbursements consisted

(1) 2 Term Rep. 407. (2) 3 M. & S. 482.

in the defrayment of these expenses. The plaintiffs in an action for general average contribution claimed, amongst other things, disbursements for pilotage inwards, for surveying, ascertaining, and repairing the damage necessary for her to resume her journey, and the expenses of landing and warehousing, and reloading, and crimpage to replace deserters during repairs. Lord Ellenborough and the rest of the Court allowed as general average so much of the expenses of repairs as were absolutely necessary to enable the ship to prosecute her voyage, but disallowed the captain's expenses in port. Le Blanc, J., adds, that the unloading might be general average if it was necessary to repair the ship. But the language of the Court in this case can only be considered as consistent with later authority as it is explained and interpreted in *Power* v. *Whitmore*. (1) The vessel in *Power* v. *Whitmore* (1) had suffered sea damage in a storm, and for the safety of ship and cargo put into Cowes, where she lay four days. She repaired her damage at Cowes, and sailed again the next day; but the day after was driven back by adverse winds and tempestuous weather, and remained at Cowes a fortnight farther. The question raised was whether the owner of cargo was liable to general average contribution in respect of the following items: (1), wages of the captain and crew at Cowes; (2), provisions consumed there; (3), repair of her bowsprit, and (4), supply of three coils of rope. All these charges were disallowed. Lord Ellenborough doubted the correctness of the language of Beawes cited in *Da Costa* v. *Newnham* (2), and distinguished *Plummer* v. *Wildman* (3), on the ground that the repairs of the ship were there rendered necessary to repair the original act of sacrifice: see *Harrison* v. *Bank of Australasia*. (4)

In the case of *Hallett* v. *Wigram* (5), the question of general average contribution arose upon demurrer. It appeared upon the pleadings that the ship had encountered a storm and been compelled to return to Adelaide for repair. It was alleged upon the pleadings that the return to Adelaide, the unloading of the cargo and the repair of the damage, were all necessary for the

(1) 4 M. & S. 141.
(2) 2 Term Rep. 407.
(3) 3 M. & S. 482.
(4) Law Rep. 7 Ex. 50.
(5) 9 C. B. 580.

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preservation of the ship and cargo, and that the repairs were necessary for the completion of the voyage and for the conveyance of the cargo to the port of delivery, which could not otherwise have got there, and that the master, being unable to raise money for the payment of the repairs, sold a portion of the cargo to enable him to do so. The Court held that the repair of the sea damage must be borne by the shipowner. Wilde, C.J., quotes with approval the following passage from Abbott: "It seems to result from these decisions, that if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port-charges, wages, and provisions during her stay, are to be considered as general average; but, if the damage was incurred by the mere violence of the wind and weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of shipowner 'to keep his vessel tight, staunch and strong' during the voyage for which she is hired."

Hall v. *Janson* (1) has been cited by the counsel for the respondents as an authority to prove that the expenses of unloading and reloading cargo constitute a claim to general average contribution, though the original cause of putting into port was a particular average loss. The real question raised in *Hall* v. *Janson* (1), which was a case decided on demurrer, was whether the declaration set out facts from which a liability of the freight to contribute to general average might arise. All that was necessary for the purpose of the decision was the proposition that, under circumstances such as those set forth in the declaration, freight might be liable to contribute to general average. The expressions of Lord Campbell as to the liability of cargo, when the expenditure has been necessary for the purpose of prosecuting the voyage are obiter dicta and at variance with later authority. That the unloading and reloading were necessary for the repairs of the ship may be an argument to shew that freight ought to contribute—but are inapplicable, as it seems to me, to the case of the cargo, which has not necessarily anything to do with the repairs of the ship.

(1) 4 E. & B. 500; 24 L. J. (N.S.) Q. B. 96.

In *Job* v. *Langton* (1) the ship with a general cargo on board had run ashore on the coast of Ireland, and it became necessary to discharge the whole of the cargo and ballast before she could be got off. The question which arose was whether the expenses incurred in getting off the ship and taking her to Liverpool for repair after the entire cargo was discharged, were chargeable to general average or to particular average to the ship alone, and the Court had power to draw inferences of fact. Lord Campbell and the Queen's Bench decided that the expenses were particular average on the ship, having been incurred after the cargo had been safely discharged and warehoused, and points out that if the learned counsel's position for the defendants were true, that the end in view of every maritime adventure being the arrival of the ship with her cargo at her destination, extraordinary acts done to effectuate this gave rise to general average, it would follow by a parity of reasoning that expenses incurred in repairing the ship at Liverpool ought equally to be general average.

A question arose in *Moran* v. *Jones* (2) as to the liability of the cargo owner to general average. The inferences of fact drawn by the Court of Queen's Bench may or may not have been correct, but the decision has reference only to the special facts of that case.

In *Walthew* v. *Mavrojani* (3) it was decided that extraordinary expenses incurred in getting off a stranded ship after the cargo has been removed to a place of safety are not, in the absence of exceptional circumstances, general average. Bovill, C.J., in his judgment refers with approval to *Hallett* v. *Wigram* (4), and the judgment of Wilde, C.J., as also to the decision in *Job* v. *Langton* (1), and distinguishes *Moran* v. *Jones* (2). "The claim," he says, "has been put upon the ground that the adventure was not complete, and that until it was terminated there was a common interest that it should be carried out; but that argument is in direct contradiction to the principle laid down with respect to repairs which are equally necessary to enable the ship to complete the adventure, but which are not matters of general average." "The proposition," says Sir James Hannen, "that general average

(1) 6 E. & B. 790.
(2) 7 E. & B. 533.
(3) Law Rep. 5 Ex. 116.
(4) 9 C. B. at p. 604.

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includes all extraordinary expenses incurred for the purpose of continuing the voyage, is not warranted by the principle which governs contribution to general average."

In *Harrison* v. *Bank of Australasia* (1) a question arose as to the right of the shipowner to charge the cargo with general average contribution in respect of spars and wood cut up by the captain in an emergency to burn with his coal, of extra coal purchased from a passing vessel, and of injury done to a donkey engine through its being continuously employed for pumping. The Court unanimously held that no claim to contribution arose in respect of the coals or the donkey engine, but differed on the question of fact whether there was such an imminent peril as to justify the sacrifice of the spars and wood. But all agreed as to the principles which regulate the law of general average. Cleasby, B., expresses himself as follows:—"Some difficulty is created in this case by referring to American authorities on this subject, and to Stevens on Average, and other works of a similar nature. The law in America does not in all respects agree with ours on the subject of general average (as will be pointed out shortly), and the other works referred to do not, in my opinion, correctly state the English law on the subject. We were pressed with many authorities to shew that imminency of danger was not necessary to make the expenses incurred by a vessel in going into port to repair a subject of general average. It is undoubted that when some sacrifice has been made (for example, cutting away masts, &c.), the expenses consequent upon going into port after the danger is over to repair this loss are in England the subject of general average; because going into port, though there is no imminent danger at the time, yet being rendered necessary by the sacrifice made in imminent danger, stands upon the same footing as the sacrifice itself. But the expenses attending the going into port to repair sea damage caused by a storm when no sacrifice has been voluntarily made, do not, it is submitted, form items of general average according to English law, although they are regarded as doing so in America: 3 Kent's Commentaries (10th edition), p. 329 and note." Kelly, C.B., in delivering the judgment of himself and Baron Bramwell adds: that the ingredients of a case of general average are,—peril of the seas

(1) Law Rep. 7 Ex. 53.

imminent, certain loss in a short time unless something not to be anticipated should intervene, and a sacrifice of the property of one for the benefit of all. And he proceeds to cite as the true principle applicable to these cases the passage from Abbott on Shipping referred to by Wilde, C.J., in the case of *Hallett* v. *Wigram* (1), which I have aleady mentioned.

We have however been asked to consider the present case as governed by the judgment of the Court of Appeal in *Atwood* v. *Sellar* (2), where it was held that port of refuge expenses of the same character as those now in issue were properly chargeable to general average. The broad and obvious distinction is that in *Atwood* v. *Sellar* (2) there was a general average sacrifice of a portion of the ship herself which rendered necessary the repairs of the vessel in port and the unloading, warehousing, and reloading of the cargo for that purpose. The Court of Appeal in terms abstained from pronouncing on the question that has now arisen, and unless it follows as a necessary implication from their judgment that the port of refuge expenses ought to be similarly treated when there is *no* general average act which renders necessary any unloading or repairs in port, the matter is not concluded by that authority. The principle of law however that appears to be the basis of the decision in *Atwood* v. *Sellar* (2) is, that an expenditure directly caused by a general average sacrifice is part of the loss that it entails, and becomes the subject of general average contribution. The port of refuge expenses which the present respondents claim to treat as general average have not been caused by the putting into port, and there was no still earlier general average sacrifice to cause them, as in *Atwood* v. *Sellar* (2). They cannot, therefore, in the present case be said either to be general average sacrifices themselves, nor caused by any general average sacrifice. In my opinion the judgment of Mr. Justice Lopes ought to be reversed, and the action dismissed with costs here and below.

Judgment reversed.

Solicitors for plaintiffs: *Field, Roscoe, & Co.*
Solicitors for defendants: *Waltons, Bubb, & Walton.*

(1) 9 C. B. 580. (2) 4 Q. B. D. 342; 5 Q. B. D. 286.

W. P.

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May 7.

[IN THE COURT OF APPEAL.]

SPELLER & CO. *v.* THE BRISTOL STEAM NAVIGATION COMPANY.

Practice—Third-Party Notice—Order XVI., r. 48—Indemnity—Order XI., r. 1 (g)—Service out of Jurisdiction.

Where a defendant is not entitled to claim contribution against a person not a party to the action, he can only be entitled under Order XVI., rule 48, to issue a third-party notice to such person, where under a contract expressed or implied he is entitled to indemnity over against him.

Therefore, where the defendants were sued for damages to the plaintiffs' goods while on board a vessel of the defendants on a certain voyage, by reason of the vessel being not seaworthy for the voyage, it was held by the Court of Appeal that the defendants were not entitled to a third-party notice under Order XVI., rule 48, to the persons of whom the defendants had hired the vessel with a warranty that she was tight, staunch, strong, and fitted for the service.

By Order XI., rule 1, service out of the jurisdiction of a . . . notice of a writ of summons may be allowed by the Court or a judge whenever . . . (*g*) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction:—

Held (by the Queen's Bench Division) that Order XI., rule 1 (*g*), does not apply to service out of the jurisdiction of a third-party notice on a third party domiciled or ordinarily resident in Scotland.

ACTION by plaintiffs as indorsees of bills of lading, signed by the defendants' agent, for damage to a certain number of bags of sugar belonging to the plaintiffs, shipped under such bills of lading on board the steamship *Dale*, on a voyage from Amsterdam and Antwerp to Bristol, in November, 1883. In the statement of claim the damage was alleged to have occurred, amongst other causes, from the vessel not being seaworthy for the voyage.

The defendants obtained leave under Order XVI., rule 48, to issue a third-party notice to one Thomas Aitkin, on an affidavit made by their secretary that in October, 1883, the defendants hired by charter the steamship *Dale*, from Thomas Aitkin, to be employed in such trades as the defendants might direct, and that Thomas Aitkin warranted the vessel, at the time of making the charter, to be tight, staunch, strong, and every way fitted for the service. The affidavit stated that should the plaintiffs be entitled to recover against the defendants in this action on

account of the unseaworthiness of the steamship, the defendants were entitled under the charter to an indemnity from Thomas Aitkin.

Thomas Aitkin being resident at Leith, in Scotland, the defendants applied at chambers for an order under Order XI., rule 1 (*g*), to allow them to serve the third-party notice on him out of the jurisdiction.

This order having been refused by Mathew, J., the defendants appealed to the Queen's Bench Division.

Bucknill, for the defendants. Service of notice of a writ of summons may be allowed by the Court or a judge whenever "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction": Order XI., rule 1 (*g*). *Lenders* v. *Anderson* (1) was a decision on sub-sect. (*e*), which provides for service out of the jurisdiction, "unless the defendant is domiciled or ordinarily resident in Scotland or Ireland." Those words are left out of sub-sect. (*g*). Moreover (*e*) applies to a defendant, whereas (*g*) applies to "any person." The third party here is a "proper" party, as distinguished from a "necessary" party to the action. The provision is new, and that it applies to third parties is shewn by the insertion in the following rule 2, after the word defendant, the new words "or person sought to be served."

[HUDDLESTON, B. What can the "concurrent remedy" referred to in that rule be, in the case of a third party?]

It is no doubt difficult to suggest.

[HUDDLESTON, B. Although, according to our decision in *Lenders* v. *Anderson* (1), you could not serve a defendant domiciled or ordinarily resident in Scotland, yet when there is even a mere nominal defendant in England, a person in Scotland could, according to your argument, be served as a third party.]

It would be a hardship to bring a Scotch defendant to litigate in England. But a third party need not appear and there is not necessarily judgment against him, and therefore he would not be hurt by the notice.

(1) 12 Q. B. D. 50.

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GROVE, J. This question is not free from difficulty; but it would lead to extravagant consequences if we were to hold that the third party in Scotland could be served with the notice. The first, pointed out by my brother Huddleston, was that although Aitkin could not be served as a defendant, yet on making a defendant in England, Aitkin might be served as a third party. It does not appear to me that the third party is a "necessary or proper party" to the action within the meaning of the rule. My opinion is that those words do not mean any party who may collaterally be brought into the action for certain purposes within the Rules of the Judicature Act, but mean a person who is a necessary or proper party against whom the action is brought. A third party is not a defendant, nor a person against whom a verdict may be obtained, although he may come in and cross-examine witnesses, and may be bound by a verdict against the defendant. Another objection pointed out by my brother Huddleston is that arising from the words "concurrent remedy" in rule 2. My opinion is that under neither of the rules can the defendants serve the notice on the third party in Scotland, and that *Lenders* v. *Anderson* (1) applies. Aitkin is not a "necessary or proper party" and cannot be served, because if he *were* a proper party he would be within our decision in *Lenders* v. *Anderson* (1) and as he is *not* a proper party the rule does not apply. To the suggestion that he may disobey the order and yet not be hurt I cannot agree, because the third party would be in a dangerous position if he did not come in. Another reason against granting the application is that if we did so we should virtually contravene the intention of the Act, by allowing a Scotchman or Irishman to be brought to England in an action to which he was not an immediate party, while a defendant liable could not be brought.

The motion must be refused.

HUDDLESTON, B. I am of the same opinion. The sub-division (*g*) in rule 1, of Order XI., is a new provision with respect to service out of the jurisdiction. Formerly the Court of Chancery had discretionary power to order service out of the jurisdiction in

(1) 12 Q. B. D. 50.

any suit before it. It was decided in *In re Eager, Eager* v. *Johnstone* (1) that that jurisdiction is now entirely gone, and that the only jurisdiction in the High Court is under Order XI., rule 1; and the late Master of the Rolls said, "The new rule is exhaustive: the old practice is no longer applicable. This case is admitted not to be within the rule, therefore we cannot order service."

By rules 1 and 2 read together, the service out of the jurisdiction of a writ of summons which is asked for against a defendant domiciled or ordinarily resident in Scotland or Ireland in an action on contract cannot be granted. We have so decided in *Lenders* v. *Anderson* (2), and therefore the defendant in an action, who is in Scotland or Ireland where he is domiciled or ordinarily resident, must have the case against him tried in one or the other of those countries respectively, and not in England. Mr. Bucknill asks us to make a person domiciled or ordinarily resident in Scotland liable to be served there with a third-party notice, that is to say, that although the defendant under such circumstances cannot be served, service on the third party may be allowed. The only subsection of rule 1 under which it could be asked for is (*g*). Under that subsection, service of a writ of summons or notice of a writ of summons may only be allowed on a "necessary or proper party," I do not stop to inquire "whether domiciled or ordinarily resident in Scotland or Ireland" or not. Is Mr. Aitkin a "necessary or proper party" to the action? He is certainly not a "necessary" party. Then is he a "proper party"? I do not think that he is. He is not at present a "party" at all. There is the third party order, under which he may either come in and defend, or which he may disregard. If he disregards it he may be bound by it. If he appears he may set up any excuse he may have, but he is no "party to the action." I do not think that subs. (*g*) of rule 1 is applicable to third-party orders, and I think clearly it is not applicable to a third party domiciled or ordinarily resident in Scotland or Ireland.

J. R.

The defendants appealed.

A. B. P. Gaskell, for the defendants. The case is within

(1) 22 Ch. D. 86, at p. 87. (2) 12 Q. B. D. 50.

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Order XI., rule 1 (*g*), and leave should be given to serve the third-party notice out of the jurisdiction.

[FRY, L.J. How do you shew your right to issue a third-party notice?]

Order XVI., rule 48, empowers a defendant, with the leave of the Court or judge (which has been here given), to issue a third party notice "where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action." Here the defendants, if not entitled perhaps to claim contribution, are entitled to claim indemnity over against Aitkin, for, as appears from the statement of claim, the sugar is alleged to have been damaged by reason of unseaworthiness against which there was Aitkins' warranty to the defendants. The Queen's Bench Division considered that the defendants were within Order XVI., rule 48, and entitled to give the third-party notice, but did not think that they had brought the case within Order XI., rule 1 (*g*).

[BRETT, M.R. This certainly is not a case for contribution, and the only question can be whether it is one in which the defendants can claim indemnity over, but how can they do so unless there is a contract of indemnity, express or implied? The old rule, Order XVI., rule 18, was not confined to contribution or indemnity, but extended to where a defendant had any "other remedy or relief over." In *Pontifex* v. *Foord* (1), Pollock, B., points out the difference in this respect between the old and the new rule, and he seems in that case to have come to the conclusion that because there was there no contract of indemnity, the case was not within Order XVI., rule 48.]

That case is not binding in the Court of Appeal, and to put such a construction on the word "indemnity" would be too narrow a one, and not what was intended by the framers of the rule. "Indemnity" should include such remedy or relief over as was sufficient to entitle a defendant under the old rule, viz., Order XVI., rule 18, to have issued a third-party notice. The defendants in an action against Aitkin, for the breach of his warranty, would be entitled to recover the same damages as those for which they may be liable to the plaintiffs in the present

(1) 12 Q. B. D. 152, at p. 155.

action. It is a case, therefore, within the meaning of Order XVI., rule 48.

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BRETT, M.R. The new rule, Order XVI., rule 48, alters the old rule, that is Order XVI., rule 18, by which a defendant could have issued a third-party notice, and it gives a defendant power to issue such notice only where he "claims to be entitled to contribution or indemnity over against any person not a party to the action." What is the meaning there of "indemnity," for it has not been contended that the present case is one for contribution? When by law may a person be entitled to indemnity? It is only when there is a contract express or implied that he shall be indemnified. Under the old rule, viz., Order XVI., rule 18, there were the words "indemnity or other remedy or relief over," and, therefore, under that rule a defendant might issue the notice against a third party when he did not claim to be entitled to an indemnity, but the new rule leaves out those words "or other remedy or relief over," and confines the right to issue such notice to the case where a defendant claims to be entitled to contribution or indemnity. It seems to me that "indemnity" in the new rule must have the same meaning it had in the old rule, and that it can only apply to the case where a third person has contracted to indemnify the defendant. In the present case it is clear that there is no contract to indemnify. If the defendants' case be true, they may probably recover the same damages against the shipowner of whom they chartered the ship as the cargo-owner may recover against them, but that is not enough to entitle them to give this third-party notice, inasmuch as to entitle them to do so there must be a contract to indemnify them. What may be the result as to the mode of trial of the second action when both actions are in existence it is not for us to say now. All that we can say is that the defendants are not entitled to issue a third-party notice, and I think that the construction which Pollock, B., in *Pontifex* v. *Foord* (1), put on the present rule—Order XVI., rule 48—is the right one.

BOWEN, L.J. I am of the same opinion. I think that the

(1) 12 Q. B. D. 152.

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decision in *Pontifex* v. *Foord* (1) is correct. Under the old rule a defendant had a wider power than he has under the present rule to bring in third persons against whom he might claim to be entitled to relief or other remedy. The exercise of that wider power was found to work inconvenience, and therefore the alteration in the present rule was made deliberately. Now by the present rule, that is Order XVI., rule 48, a defendant is only to be able to give a third-party notice when he "claims to be entitled to contribution or indemnity." In this case the defendants have no claim to contribution, nor have they any claim to indemnity as such, because they have no contract or right to indemnity as such. The mere circumstance that the damages which they may recover may probably be the same as those which may be recovered against them, does not convert either of the two contracts into a contract of indemnity.

FRY, L.J. I also am of the same opinion. It seems to me that the defendants' claim is not for an indemnity. It has been contended that a larger meaning than that which we are giving should be given to the word "indemnity" in this rule 48, so as to include every case in which the measure of damages is the same. I think not. I think its strict meaning, and no other, should be given to it.

Appeal dismissed.

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*
Solicitors for defendants: *Lowless & Co.*

(1) 12 Q. B. D. 152.

W. P.

SHAW *v.* THE PORT PHILIP AND COLONIAL GOLD MINING COMPANY, LIMITED.

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May 19.

Company—Share Certificate issued by Secretary—Forgery—Principal and Agent—Scope of Employment.

It was the duty of the secretary of a company to procure the execution of certificates of shares in the company with all requisite and prescribed formalities, and to issue them to the persons entitled to receive the same. By a resolution of the directors of the company it was provided that certificates of shares should be signed by one director, the secretary, and the accountant. The secretary of the company having executed a deed purporting to transfer certain shares in the company to one G., a purchaser of such shares, issued to G. a certificate stating that he had been registered as the owner of the shares. Such certificate was in the usual and authorized form, and sealed with the company's seal, but the signature of the director appended thereto was a forgery, and the seal of the company was, in fact, affixed thereto without the authority of the directors.

G. deposited the certificate with the plaintiff as a security for advances, and subsequently executed a transfer of the shares to the plaintiff. Neither G. nor the plaintiff had any knowledge or reason to suspect that the certificate was otherwise than a genuine document, or that the matters stated therein were untrue.

The company refused to register the plaintiff as owner of the shares, stating that there were no such shares standing in G.'s name in their books:—

Held, that the company were estopped by the certificate issued by their secretary from disputing the plaintiff's title to the shares.

SPECIAL CASE; of which the facts were in substance as follows:—

The defendants were a limited company. In December, 1880, one Thomas Gledhill, through the plaintiff as his broker, contracted on the market for the purchase of certain shares in the defendants' company.

In performance of the contract the selling brokers in the usual course handed to the plaintiff or his agent, as buying broker, a transfer of shares signed by one J. W. Purchase, the company's then secretary, accompanied by what purported, and in all respects appeared to be, a regularly issued certificate of those shares. The said Thomas Gledhill through the plaintiff, as his broker, deposited the transfer and certificate at the company's office in London with Purchase, the company's secretary, and requested that the company should register him as the proprietor of the shares and issue him a certificate for them in the usual way. A certificate, or what purported to be a certificate, of the shares

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and of the registration thereof in the name of Gledhill was, on or about the 16th of March, 1881, forwarded to the plaintiff as the broker and agent of Gledhill by the company's secretary. The certificate was dated the 14th of February, 1881, and was in all respects in the usual and authorized form: it was sealed with the seal of the company, and signed J. R. MacDonnell, Director, and J. W. Purchase, Secretary. It was part of the regular and authorized duty of Purchase, as the company's secretary, to receive and examine transfers and certificates of shares, to have transfers registered, to procure the preparation, execution, and signature of certificates with all requisite and prescribed formalities, and thereupon to issue them to the persons entitled to receive them. By the deed of settlement of the company it was provided that "the secretary shall keep in safe custody at the chief office of the company the registers, receipt books, books of account, and the common seal of the company, permitting such inspection as is hereinafter provided of such of the same as hereinafter mentioned, and affixing the seal of the company and allowing its use to such documents and on such occasions only as he is authorized and required to affix it, or allow it to be used by the board of directors by resolution duly passed." By a resolution of the directors passed on the 23rd of May, 1865, it had been ordered "that two keys be provided for the custody of the company's seal in addition to the one now held by the secretary, the said two keys to be kept, one by the chairman, and the other by the deputy-chairman, and that the seal be used only in presence of either the chairman or deputy-chairman, and also that the certificates of shares be signed in future by one director, the secretary, and the accountant." At the time of issuing the certificate Purchase was both secretary and accountant of the company. The company, on the 1st of March, 1881, paid a dividend to Gledhill upon the shares by cheque signed by the secretary and two directors of the company.

In March, 1881, Gledhill deposited the certificate with the plaintiff, who acted as his stockbroker, by way of cover or security for all moneys due or which might become due from him to the plaintiff for advances in the course of business. The plaintiff, on the 15th of December, 1882, gave notice to the company that

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the certificate had been so deposited with him as security. On the 16th of the same month the company informed the plaintiff that no shares as described in the certificate were standing in Gledhill's name in their books. The signature, J. R. MacDonnell, appended to the certificate was forged, and the seal of the company was affixed thereto without the knowledge or authority of MacDonnell or any other director. It was stated in the case that it might have been affixed in the presence of MacDonnell or some other director, but was not so with the knowledge or authority of MacDonnell or any other director.

One of the company's directors, in fact, bore the name J. R. MacDonnell, and neither the plaintiff nor Gledhill had, up to the time of the above-mentioned communication from the company, any knowledge or suspicion or ground for suspecting that the certificate was not a genuine and regularly issued document, or that the matters stated therein were not in all respects true.

Between the date of the deposit of the certificate and the 16th of December, 1882, the plaintiff had in the course of business made advances to Gledhill on the security of the certificate to an amount exceeding 50*l.* over and above what the latter owed him at the first mentioned date. The said advances and debts remained unpaid.

On the 17th of March, 1883, Gledhill executed a transfer of the shares to the plaintiff by way of completing the mortgage of the shares by deposit, and the plaintiff then called on the company to register the shares in his name pursuant to such transfer, this, however, they refused to do. The shares were worth 20*l.*

The question for the Court was whether the plaintiff in and from the month of March, 1881, had a good title as against the company to the shares. If this question was answered in the affirmative, judgment was to be entered for the plaintiff for 20*l.* and costs; if in the negative, for the defendants with costs.

R. O. B. Lane, for the plaintiff. The company is responsible for the fraud of its agent acting in the ordinary course of the company's business: *Barwick* v. *English Joint Stock Bank.* (1)

(1) Law Rep. 2 Ex. 259.

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It was the duty of the secretary to procure the execution of the certificate with the prescribed formalities and to issue it to the plaintiff, and therefore what he did was a misrepresentation within the scope of his employment, and the defendants are estopped by the certificate so issued by him from denying the plaintiff's right to the shares: *In re Bahia and San Francisco Ry. Co.* (1); *Swift* v. *Winterbottom* (2); *Swire* v. *Francis.* (3)

Moulton, for the defendants. There is no estoppel as against the defendants, for they have done no act representing to the plaintiff that he was the owner of these shares. All the cases cited depend on the fact that there had been a misrepresentation by the defendants' agent in the course of his duty. It is the duty of the secretary to issue genuine certificates of registration, and such certificates might bind the company, but this does not put him in the position of a person authorized to represent that a forged signature is genuine. The signature of the director being forged the whole document is a forgery and a nullity. There is no case in which it has been held that it is within the scope of an agent's authority to represent that a forgery is a genuine document. The very fact that such a formality as the signature of the director is required shews that the secretary is not authorized to represent that such signature when forged is genuine, for otherwise no such formality could possibly be of any avail. He has only the ministerial function of procuring the necessary requisites of a certificate and handing it over. In the present case he does not issue a certificate, but something which has no validity whatever. The contention of the plaintiff must in substance assert that it is within the scope of the secretary's authority himself to execute a certificate which clearly is not the case.

[STEPHEN, J. Is the transferee of shares bound to ascertain that the seal has been affixed in the presence of the directors, and that the signature of the director is genuine? How in the ordinary course of business would this be practicable?]

It may be that it is not in practice possible for him to do so, but in the ordinary course of affairs it may practically be neces-

(1) Law Rep. 3 Q. B. 584. (2) Law Rep. 8 Q. B. 244.
(3) 3 App. Cas. 106.

sary that documents should be taken on the faith of their genuineness, and yet the taker of them must take the risk of their being forgeries.

STEPHEN, J. The question in this case is whether the plaintiff had a good title as against the company to these shares.

The facts upon which the case turns are in substance these. A certificate has been issued on which the plaintiff relies. That certificate states that Gledhill is the registered owner of the shares in question, it purports to be signed by J. R. MacDonnell as director, and it is sealed with the seal of the company. On the faith of that certificate the plaintiff took a transfer of the shares, and the question is whether that transfer gives him a good title. The facts with regard to the issue of the certificate are not quite so clear as might be desired, but it appears that the secretary signed the certificate himself; that he got possession of and affixed the company's seal; that he either forged or got some one else to forge the signature of the director; and that he then issued the certificate to Gledhill's broker as a document to shew that Gledhill was the proprietor of the shares. That being the state of things, it does not appear to be disputed that, if there had been no forgery, but merely a fraudulent or improper issue of the certificate by the secretary, it would have bound the company. The case of *In re Bahia and San Francisco Ry. Co.* (1) establishes the principle on which such a case would turn, and on that principle the company would in such case have been bound. The counsel for the plaintiff has asked how the present case differs from that case. It is said in answer that here the secretary carried out his fraud by means of forgery. It appears to me that this fact does not make any material difference. The defendants' counsel said it did make a difference on the ground, so far as I understand his argument, that nothing can give validity to a forged instrument as against anybody. That does not seem to me to be the case, and I think the authorities cited for the plaintiff are applicable. The company appear in this case to have prescribed certain formalities with regard to the

(1) Law Rep. 3 Q. B. 585.

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use of the seal and the issue of certificates. The certificate is to be signed by a director and the secretary. In the present case it apparently does comply with those formalities; it is apparently so signed, and it is stated to be in the usual and authorized form. The company made it the duty of the secretary to procure the preparation, execution, and signature of certificates with the prescribed formalities, and thereupon to issue them to the persons entitled to receive them. They thereby gave the secretary the opportunity of doing what he has done in this case. A person can inform himself whether the certificate comes from the secretary because he gets it from the secretary's office, but I do not see how, according to any practicable course of business, he can go behind the certificate and ascertain for himself such matters as whether the signature of the director is genuine. It appears to me, therefore, that the company have authorized the secretary, and made it his official duty, to act in such a way that his acts amount to a warranty by them of the genuineness of the certificate issued by him. For these reasons I think the question put to us should be answered in favour of the plaintiff.

MATHEW, J. I am of the same opinion, on the ground that the company is responsible for the fraud committed by its agent while acting within the ordinary scope of his employment. Upon the statements contained in the case I cannot doubt that it was within the scope of their secretary's employment to do what he did here. It is stated to have been the duty of the secretary to procure the execution of the certificate with the prescribed formalities, and to issue it to the person entitled thereto. It is obviously indispensable in the ordinary course of business that the secretary should perform these duties, and it never could have been contemplated that the purchaser of shares should himself ascertain that each of the prescribed formalities had, in fact, been complied with. It seems to me, therefore, that the secretary is held out by the company as their agent to warrant the genuineness of the certificate. It was argued by the counsel for the defendants that the fact that the certificate was a forgery prevented their being liable for the act of their agent, but he failed, as it appeared to

me, to establish any difference for this purpose between a fraud carried out by means of forgery and any other fraud. For these reasons I am of opinion that our judgment should be for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Jaques, Layton, & Jaques.*
Solicitors for defendants: *Maples, Teesdale, & Co.*

E. L.

VALLANCE *v.* FALLE.

May 23.

Statutory Duty, Action for Breach of—Ship and Shipping—Merchant Shipping Act, 1854 (17 *&* 18 *Vict. c.* 104), *s.* 172—*Refusal to give Certificate of Discharge to Seaman—Penalty.*

An action will not lie for the refusal to give to a seaman the certificate of discharge directed to be given by the 172nd section of the Merchant Shipping Act, 1854, the only remedy for such refusal being the penalty provided by that section.

APPEAL from the County Court of Dorsetshire.

The action was brought by the plaintiff, a seaman, to recover from the defendant, the master of the ship *Brighton*, trading between Weymouth and the Channel Islands, damages for improperly withholding and detaining from the plaintiff a certificate of discharge to which the plaintiff was entitled on the termination of his service on board the said ship, whereby the plaintiff was unable to obtain employment in other ships. At the hearing of the action in the county court it was contended on behalf of the defendant that there being no common law duty or obligation imposed upon the master of a vessel to give such certificate of discharge before the passing of the Merchant Shipping Act, 1854 (1), and that statute having imposed a penalty of 10*l.* for

(1) The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) s. 172, provides as follows:—"Upon the discharge of any seaman or upon payment of his wages the master shall sign and give him a certificate of his discharge, in a form sanctioned by the Board of Trade, specifying the period of his service and the time and place of his discharge; and if any master fails to sign and give to any such seaman such certificate of discharge he shall for each such offence incur a penalty of 10*l.*" The 524th section

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withholding the certificate, a common law action could not be maintained. The county court judge decided in favour of this contention, and nonsuited the plaintiff.

F. Turner, for the plaintiff, contended that, notwithstanding the imposition of the penalty by the statute, an action lay for damages occasioned to the plaintiff through the breach by the defendant of the statutory duty to give the certificate. He cited *Couch* v. *Steel* (1); *Atkinson* v. *Newcastle Waterworks Company* (2); *Stevens* v. *Jeacocke* (3); *Beckford* v. *Hood* (4); *Hurrell* v. *Ellis* (5); *Rogers* v. *McNamara* (6); *Wright* v. *London General Omnibus Company* (7); 36 & 37 Vict. c. 85, s. 31.

H. Tindal Atkinson, for the defendant, contended that upon the true construction of the statute the penalty was the only remedy for breach of the statutory duty and that no action lay.

STEPHEN, J. I think the judgment of the county court judge was correct and must be affirmed. The case has been argued with great care, and various authorities on the subject have been cited. The general rule to be deduced from them seems in substance to be that the provisions and object of the particular enactment must be looked at in order to discover whether it was intended to confer a general right which might be the subject of an action, or to create a duty sanctioned only by a particular penalty, in which case the only remedy for breach of the duty would be by proceedings for the penalty. It is necessary therefore to consider

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of the same Act provides as follows:—"Any court, justice, or magistrate imposing any penalty under this Act for which no specific application is herein provided may, if it or he thinks fit, direct the whole or any part thereof to be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed, or to be applied in or towards payment of the expenses of the proceedings; and, subject to such directions or specific application as aforesaid, all penalties recovered in the United Kingdom shall be paid into the receipt of Her Majesty's Exchequer in such manner as the Treasury may direct, &c."

(1) 3 E. & B. 402; 23 L. J. (Q.B.) 121.

(2) 2 Ex. D. 441.

(3) 11 Q. B. 731; 17 L. J. (Q.B.) 163.

(4) 7 T. R. 620.

(5) 15 L. J. (C.P.) 18.

(6) 23 L. J. (C.P.) 1.

(7) 2 Q. B. D. 271.

the provisions of the statute in this particular case to see what the legislature intended. By the 172nd section of the Merchant Shipping Act, 1854, it is made the duty of the master upon the discharge of any seaman to give him a certificate of his discharge in a form sanctioned by the Board of Trade, specifying the period of his service and the time and place of his discharge, and it is provided that, if any master fails to give such certificate of discharge, he shall for such offence incur a penalty not exceeding 10*l*. On searching through the Act very little appears to shew what particular value is to be attached to that certificate. In the case of foreign-going ships the certificate may be of some value, because the form sanctioned by the Board of Trade in that case includes an entry as to character, but in the case of coasters that is not so, and it does not appear that the legislature have given any particular effect to the certificate, or that any special value attaches to it. Then there is the provision of s. 524, which provides generally with regard to penalties that the magistrate may direct their application wholly or in part to the compensation of the party injured by the act or default in respect of which the penalty is imposed. There appear to be no other provisions affecting the case besides these two sections, and the whole effect of the legislation seems to me to be simply this; the master is to give the certificate of discharge, and if he does not he is to be liable to a penalty of 10*l*. which may be applied wholly or in part to compensating the seaman. The plaintiff's counsel tried very hard to get more than this out of the statute, but in my opinion he failed to do so. I do not think it necessary to go through all the cases cited; as I have said, the result of them seems to be that the answer to the question in each case depends upon the language and object of the particular statute. For instance in the case of *Beckford* v. *Hood* (1) it was obvious that, if the construction contended for had been applied to the statute which was passed for the protection of copyright, and the penalty had been held to be the only remedy, the value of copyright would have been utterly destroyed. Again, in the case of *Atkinson* v. *Newcastle Waterworks Company* (2) it was equally obvious that the statute never could have intended that the

(1) 7 T. R. 620. (2) 2 Ex. D. 441.

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company should be made gratuitous insurers against fire of the whole town of Newcastle. I do not wish to say anything against the general rules that have been laid down for the construction of statutes in relation to the question whether a penalty is intended to be the only remedy for breach of a statutory duty, but I always think that after all the best way of finding out the meaning of a statute is to read it and see what it means. I think in this case, having regard to the nature of the certificate, and the provisions in relation thereto, that the only remedy for withholding it was by proceeding for the penalty.

MATHEW, J. I am of the same opinion, and I must say that from the first I have not entertained much doubt on the subject. It was argued for the plaintiff that the penalty was not intended to be the sole remedy for a breach of the duty to give the certificate. If this were so, it would follow that proceedings for a penalty might be taken before the magistrate and a penalty imposed, and afterwards an action might be brought for damages. It seems to me that no one reading the enactment and considering the subject matter could entertain a doubt that the legislature did not intend such a consequence. The certificate is not a certificate of character, and 10*l.* might be an abundant compensation for any wrong done to a seaman by withholding the certificate. It seems to me that upon the true construction of the Act it never could have been intended that the withholding the certificate should furnish ground for an action.

Judgment affirmed, and leave to appeal refused.

Solicitors for plaintiff: *Coode, Kingdon, & Cotton,* for *J. H. Jolliffe.*

Solicitors for defendant: *Wainwright & Baillie.*

E. L.

[IN THE COURT OF APPEAL.]

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May 2.

EX PARTE OWEN. IN RE OWEN.

Bankruptcy—Notice—Receiving Order—Notice in Name of Partners—Bankruptcy of one Partner before Hearing of Petition—Right of solvent Partner to receive Partnership Assets as against Trustee of bankrupt Partner—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

After the bankruptcy of a partner and the appointment of a trustee of his property his solvent partner has a right to receive, and can give a good discharge for, the partnership assets, and is entitled, for the purpose of collecting or recovering the assets, to use the name of the trustee, upon giving him an indemnity.

After one of two partners had filed a liquidation petition and a receiver had been appointed, a judgment was recovered in an action previously commenced in the names of the two partners against O., a debtor of the firm. A bankruptcy notice in the names of the two partners was then served on O.; he failed to comply with it within the seven days limited for the purpose, and a bankruptcy petition was presented against him in the names of the two partners. Before this petition came on to be heard, the creditors of the partner who had filed the liquidation petition had resolved on a liquidation by arrangement, and had appointed a trustee of his property:—

Held, that though there was a good act of bankruptcy, a receiving order could not properly be made against O., unless the trustee in the liquidation was joined as a co-petitioner.

ON the 26th of November, 1883, a writ was issued in the Queen's Bench Division by Edward Peyton and Frank Peyton, who carried on business in partnership as Peyton & Peyton, against F. J. G. Owen, claiming payment of the sum of 183*l.* 15*s.* 4*d.*, principal and interest, in respect of a bill of exchange of which Owen was the acceptor and which had been indorsed to the plaintiffs. The writ was served on the defendant on the 30th of November. On the 12th of December, 1883, Edward Peyton filed a liquidation petition in the London Bankruptcy Court, and C. A. Harrison was appointed receiver of his property. On the 20th of December final judgment was signed in the action for 191*l.* 19*s.* 3*d.*, principal, interest, and costs. On the 14th of January, 1884, Owen was served with a bankruptcy notice in the name of the firm, claiming payment of the judgment debt of

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191*l.* 19*s.* 3*d.* The notice was not complied with, and on the 22nd of January a bankruptcy petition was presented in the Canterbury County Court against Owen in the name of the firm, asking for a receiving order in respect of his estate. The petition was founded on the failure to comply with the bankruptcy notice as an act of bankruptcy. It was signed "E. & F. Peyton, by F. Peyton, a member of the firm." It alleged that Owen "is justly and truly indebted to us in the sum of 191*l.* 19*s.* 3*d.*" under and by virtue of the judgment. The first meeting of the creditors of E. Peyton under the liquidation petition was held on the 28th of February, 1884, when a liquidation by arrangement was resolved upon, and Harrison was appointed trustee. On the 28th of March, 1884, the bankruptcy petition was heard by the registrar of the county court. It was objected on behalf of Owen that the interest of Edward Peyton in the judgment debt was vested in the trustee in his liquidation, and that a receiving order ought not to be made, at any rate in the absence of that trustee. The registrar overruled the objection and made a receiving order. Owen appealed.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the appellant. By virtue of the liquidation petition and the subsequent resolutions for liquidation by arrangement, the partnership was by relation back dissolved as from the 12th of December, and from that date the debt due by Owen ceased to be due to the partners jointly, and became due to the solvent partner and the trustee in bankruptcy of the other as tenants in common: *Barker* v. *Goodair*. (1) There was, therefore, no joint debt due either at the time when the bankruptcy notice was served, or at the time when the bankruptcy petition was presented. Consequently no act of bankruptcy was committed, and there was not a good petitioning creditor's debt. The doctrine of agency as between partners does not apply as between tenants in common. No doubt it has been held that a dealing by a solvent partner, after a secret act of bankruptcy by his partner, is good as against that partner's trustee in bankruptcy, but that does not apply to an open act of bankruptcy such as the filing of a liquidation petition. The

(1) 11 Ves. 78, 83.

requirements of the Act and Rules must be strictly complied with: *In re Hodges.* (1) Payment of the debt to Frank Peyton under the bankruptcy notice would not have been a good payment after notice of the appointment of the receiver. Notice of the appointment from the advertisement in the *Gazette* would be sufficient. It could not be said at that time that there was a joint debt, because circumstances then existed which shewed that it might not be a joint debt.

[BAGGALLAY, L.J. In a certain contingency there would not be a joint debt.

LINDLEY, L.J. There could be only one fi. fa. on the judgment for the whole amount of the debt.]

No doubt if the sheriff had levied, the debt would have been discharged by operation of law. But, when fresh proceedings are voluntarily taken, the party who takes them must set forth the real state of things at the time.

[COTTON, L.J. Must not your argument go to the extent of saying that the judgment was also bad?]

It is sufficient to say that a bankruptcy notice must be issued by a person who is a creditor at the time when it is issued, and here no debt was due to Edward Peyton and Frank Peyton at the time when the notice was issued.

[COTTON, L.J. Sub-sect. 1 (g) of sect. 4 says that the notice is to require payment of the judgment debt "in accordance with the terms of the judgment."]

Still the creditor must be a creditor at the time when the notice is issued. Suppose he had assigned his debt?

F. T. Procter, for Frank Peyton and for the trustee in the liquidation of Edward Peyton, was willing to assent to the discharge of the receiving order without costs.

BAGGALLAY, L.J. This is a case of considerable complication, and the difficulty in it is increased because there has been no argument on behalf of the respondents. It is impossible not to see that there is a general desire to get rid of the receiving order. I have come to the conclusion that, at the time when that order was made, the petition on which it was made was not properly

(1) Law Rep. 8 Ch. 204.

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constituted. It was the petition of Edward and Frank Peyton as partners, and at that time Edward had presented a liquidation petition, and a trustee of his property had been appointed. There can, I think, be no doubt that, in order to justify the order which was made on the petition, the trustee ought to have been made a party to it, and ought to have been before the Court at the hearing. This necessity had arisen subsequently to the presentation of the petition, but it justifies us in discharging—indeed, I think it makes it imperative on us to discharge—the receiving order. Then the question arises, what ought now to be done, and I think the proper course is to give leave to amend the petition, by adding the trustee as a co-petitioner, and in such other way as the petitioner may be advised. If this is not done within a reasonable time, the receiving order will be discharged with costs.

COTTON, L.J. We ought now to do that which the registrar ought to have done at the hearing of the petition. I am of opinion that the proper course would have been to correct the irregularity which existed in the petition at the time when it was heard. The trustee ought to have been made a co-petitioner, and, if he is now willing to join in the petition, I think the petition should be amended by making him a co-petitioner, and that a receiving order should then be made on the amended petition. It has been argued that no act of bankruptcy has been committed, but I am of opinion that there is a good act of bankruptcy. The judgment was obtained in favour of the two partners, and it is a good judgment. I am also of opinion that the bankruptcy notice was a good notice, for, at the time when it was served, there was nothing which could affect its validity but the pendency of Edward Peyton's liquidation petition. The notice was given in the names of the two persons who had obtained the judgment. It is said that the passing of the liquidation resolutions and the appointment of the trustee vested the property of Edward Peyton in the trustee as from the 12th of December. That, however, could not prevent the solvent partner from getting in the partnership assets. In my opinion, when one partner in a firm has become a bankrupt, the solvent partner has a right to get in, and to insist on getting in, the

assets of the dissolved partnership, and has even a right to use for that purpose the name of the trustee in the bankruptcy, on giving him an indemnity. I am of opinion that the bankruptcy notice was a good notice, and that the act of bankruptcy was complete, though, when the petition came on to be heard, a receiving order could not properly be made on it in the absence of the trustee in the liquidation.

LINDLEY, L.J. I am of the same opinion. It has, I think, been attempted to carry the doctrine of relation back further than is consistent with the general principles of the Court. There was the judgment, and in no way which occurs to me could the defendant have resisted it, or even have obtained a stay of the proceedings under it. Still less could the judgment have been set aside. Even if a trustee has been appointed in the bankruptcy of one partner, the solvent partner has a right to get in the partnership assets. A receiver would not be appointed at the instance of the trustee against the solvent partner. A payment to him would be a good discharge to a debtor of the firm. This shews that the bankruptcy notice was a good notice, and that there was a good act of bankruptcy. I agree that the receiving order ought not to have been made in the absence of the trustee. He ought to have been joined as a petitioner, and that is what we now order to be done.

Solicitor for appellant: *J. Rexworthy.*
Solicitors for respondents: *Blewitt & Tyler.*

W. L. C.

1884
May 2.

[IN THE COURT OF APPEAL.]

EX PARTE DIXON. IN RE DIXON.

Bankruptcy—Petition—Receiving Order—Power of Court to refuse—"Sufficient Cause"—Execution of Creditors' Deed—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*a*), *s.* 7, *sub-s.* 3, *ss.* 15, 16, 17, 18—*Official Receiver—Appearance on Appeal—Costs.*

The fact that shortly before the presentation of a bankruptcy petition against a debtor he has, with the assent of a large majority of his creditors, executed a deed assigning the whole of his property to trustees appointed by the creditors, to be administered by them as in bankruptcy, is not, within the meaning of sub-s. 3 of s. 7 of the Bankruptcy Act, 1883, a "sufficient cause" for refusing to make a receiving order on the petition.

As a general rule the official receiver, though served with a notice of appeal, ought not to appear on the hearing, unless there are special circumstances which he desires to bring before the Court, and in the absence of special circumstances he will not be allowed his costs of appearance.

IN March, 1884, W. H. Dixon and Thomas Wilson, who carried on business in partnership at Sunderland, were in pecuniary difficulties, and summoned a meeting of their creditors. The meeting was held on the 11th of March, when a balance-sheet of the debtors' affairs, which had been prepared for them by an accountant, was produced. After some discussion a committee of five creditors was appointed to inquire into the debtors' affairs, and to report to an adjourned meeting. After the meeting a printed copy of the balance-sheet was sent by the accountant to (as he deposed) each of the creditors above 50*l.* The committee held several meetings and made inquiries into the affairs of the debtors, and they afterwards unanimously agreed to recommend to the adjourned meeting that the debtors' estate should be wound up under a deed of assignment for the benefit of creditors, to be made to such trustees as the adjourned meeting should nominate. The adjourned meeting was held on the 25th of March, when it was resolved that the debtors should be requested to make an assignment of all their estate and effects to three of the principal creditors for the benefit of the creditors generally. On the same

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day the debtors executed a deed by which they assigned to the three creditors named by the meeting all their estate, joint and separate, upon trust for all the creditors, joint and separate, and to be administered as in bankruptcy. Twenty creditors (out of twenty-six), whose debts together amounted to about 20,693*l.*, assented to and executed the deed; three creditors, whose debts amounted to about 468*l.*, returned no answer to applications made to them; and three others, whose debts amounted to about 1050*l.*, expressed their dissent. It was stated that these were in substance the whole of the creditors whose debts exceeded 50*l.* On the 25th of March, John Parker, one of the dissentient creditors, who claimed to be a creditor to the amount of 499*l.* 4*s.*, presented a bankruptcy petition against the debtors in the Sunderland County Court, alleging as an act of bankruptcy the execution by the debtors of the deed of assignment, and asking for a receiving order, and on the 17th of April the registrar made a receiving order, appointing the official receiver of the Court receiver of the estate of the debtors; and he appointed the 15th of May for the public examination of the debtors. The debtors gave notice of appeal from this order. The notice was served on the official receiver.

Cooper Willis, Q.C., and *Finlay Knight*, for the appellants. "Sufficient cause," within the meaning of sub-s. 3 of s. 7, was shewn for not making a receiving order, and the petition should have been dismissed. No doubt the execution of the creditors' deed was an act of bankruptcy, but the Court has a discretion as to making a receiving order, and under the circumstances of this case no such order should be made, but the creditors should be allowed to have the estate administered in the mode which the great majority of them desire. Sect. 18 gives the creditors power at their first meeting after the making of a receiving order to approve of an arrangement such as that which is embodied in the deed. Why should the form of making a receiving order be gone through, if the Court can see that the deed is a reasonable one? The estate would be administered under it in exactly the same way as in bankruptcy, and by persons in whom the creditors have full confidence. Under the deed the debtors' business can

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be carried on; a receiving order would put a stop to it at once. The receiver could not carry it on; it would be necessary to appoint a special manager under s. 12. Why should one creditor for a small amount be allowed to thwart the wishes of the large majority of the creditors? The Court has a much wider discretion now than it had as to making an adjudication under the former Bankruptcy Acts, and even under those Acts the Court has often refused to make an adjudication when it could see that the object was to make an inequitable use of it: *Ex parte King* (1); *Ex parte Griffin.* (2)

Winslow, Q.C., and *Herbert Reed*, for the petitioning creditor, were not heard.

M. D. Chalmers, for the official receiver.

BAGGALLAY, L.J. By sub-s. 3 of s. 7 of the recent Bankruptcy Act, it is provided that, "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition." In the present case no question arises as to the petitioning creditor's debt, or the act of bankruptcy, or the service of the petition; all those matters were in due form. Nor is it suggested that the Court was or could be satisfied that the debtor was able to pay his debts, but the appellants rely upon the provision that "for other sufficient cause" shewn the Court may dismiss the petition. They say that there was a sufficient cause for refusing to make a receiving order, by reason of a deed which had been executed by the debtors at a meeting of the creditors held on the 25th of March. The debtors appear to have called their creditors together on the 11th of March, and to have then laid certain statements before them of the particulars of which we are not informed. The meeting was adjourned until the 25th of March, and at that further meeting a proposed deed was brought in by the debtors, and was assented to by a very large proportion of the creditors. Whether all the creditors were present at that

(1) 3 Ch. D. 461. (2) 12 Ch. D. 480.

meeting we do not know; it does not appear in evidence. [His Lordship referred to the number of assenting and dissenting creditors, and continued:—] The deed which was prepared nominated three creditors to be trustees for the general body; they were apparently creditors for a very large amount as compared with the aggregate amount of the debts, and the deed was what in former times would have been called a "creditors' deed." It was an assignment of the debtors' property to the trustees to be administered for the benefit of all the creditors as in bankruptcy. The deed was in a form very well known some twenty-five or thirty years ago and down even to a more recent period, but such deeds could not, I think, be regarded as generally conducive to the benefit of the creditors of insolvent persons. However, we have now to deal with the Act of 1883, which came into operation on the 1st of January, 1884. Can the execution of that deed, and the view apparently entertained by a large majority of the creditors, by reason of their assenting to the deed, be regarded as a "sufficient cause" for refusing to make a receiving order?

We must look at the general scope of the Act as regards a deed such as that with which we are dealing. It is in substance equivalent to a liquidation of the debtors' affairs by arrangement under the Act of 1869; although it was prepared outside the Court, it provides substantially for a distribution of the debtors' assets similar to that which would have taken place if there had been proceedings for liquidation in the manner pointed out by the Act of 1869. Now, the first thing which is to take place, after a receiving order has been made, is provided for by the 15th section of the Act of 1883, which says that "As soon as may be after the making of a receiving order against a debtor, a general meeting of his creditors (in this Act referred to as the first meeting of creditors), shall be held for the purpose of" —what? "considering whether a proposal for a composition or scheme of arrangement shall be entertained, or whether it is expedient that the debtor shall be adjudged bankrupt, and generally as to the mode of dealing with the debtor's property." Nothing, to my mind, can be more clear and distinct than the object and purport of the Act as there indicated, viz., that a proposal for composition or for liquidation by arrangement shall

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take place only after a receiving order has been made, and we find that followed up by s. 17, which provides that, "where the Court makes a receiving order it shall hold a public sitting, on a day to be appointed by the Court, for the examination of the debtor, and the debtor shall attend thereat, and shall be examined as to his conduct, dealings, and property." I should have observed that in the 16th section provision is made for a full and clear statement of his affairs being made by the debtor, within three days from the date of the receiving order, if the petition is by the debtor himself, or within seven days if the order is made upon the petition of a creditor. Having made these very careful provisions for a statement being rendered by the debtor in the form prescribed by the Rules made under the Act, and for his attendance for examination at a public sitting, there comes s. 18, which, carrying out the intimation contained first of all in s. 15, enacts that "the creditors may at the first meeting or any adjournment thereof, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them from the debtor, or a proposal for a scheme of arrangement of the debtor's affairs."

Now it appears to me that to say that, outside the proceedings under the Act, and in lieu of obtaining a receiving order with all the consequent security, the most perfect and complete information should be given to the creditors before they determine whether the liquidation of the estate should be in bankruptcy, or whether there should be a composition or a scheme of arrangement, the majority of the creditors can prevent the making of a receiving order by merely expressing their willingness to have a private liquidation by arrangement, would be utterly contrary to the scope and object of the Act, and not only so, but that it would throw open the door to frauds of the very grossest character. I am far from saying, or even suggesting, that there is anything of that kind in the present case. But what would there be to prevent debtors who are fraudulently disposed from including in the list of their creditors a number of persons who are not creditors at all, and inserting others for amounts much larger than their real debts, for the purpose of obtaining, as they may think, the requisite majority when the meeting is held; and, on the other hand, from

omitting from the list of creditors many persons who, if proceedings were taken in a more full and complete manner, would have their attention drawn to the fact that they had been omitted? I rest my decision upon this ground, that it would be contrary to the purview and scope of the Act to allow proceedings of this kind to oust the jurisdiction of the Court of Bankruptcy under the Act.

I will add only one word with regard to the provisions of sub-s. 3 of s. 7. It appears to me that there are many ways in which "sufficient cause" might be shewn to induce the Court to refuse to make a receiving order. The debtor might be able to shew that some of his friends were prepared to give a guarantee for the payment of his debts in full, or that there were some proceedings pending by means of which, if he should be successful in them, he would obtain ample funds to enable him to pay his debts. There may be a great number of other things (akin to the Court being satisfied that the debtor is able to pay his debts), which may afford a good reason for the judge or registrar refusing to make a receiving order. But what has been suggested in the present case cannot, as it appears to me, be regarded as a "sufficient cause."

COTTON, L.J. It is not disputed that the petitioner's debt is a good one, or that there has been a sufficient act of bankruptcy. But it is suggested that, under the 3rd sub-section of the 7th section of the Act, on the facts of this case a sufficient cause has been shewn why a receiving order should not be made.

In my opinion this appeal raises a most important question, and I do not intend by what I may say to limit in any way (except so far as the present case requires it) the power given to the Court by these words, "that for other sufficient cause no order ought to be made." Now there were, no doubt, many cases under the old Act in which, when the Court saw that an application for an adjudication was really made, not for the purpose of getting the property of the debtor applied in payment of his debts, but for some sinister or indirect motive, it treated the application as an abuse of the provisions of the Bankruptcy Act, and refused to make the order. But the only thing we

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have now to consider is this, is it a sufficient cause for refusing the receiving order that, with the assent of the majority of the creditors, a deed has been executed by the debtors which assigns all their property to trustees for the benefit of their creditors? The first thing which occurs to one is this, that the execution of such a deed is the very first act of bankruptcy which is mentioned in s. 4 of the Act, and, if it had been intended that the execution of a deed of this kind should, if the Court was satisfied with its provisions, be a sufficient cause for not making the receiving order to which the petitioner would otherwise be entitled, one would have expected to find some special provision to the effect that, if the act of bankruptcy relied upon was the execution of a deed for the benefit of the creditors, the Court, notwithstanding that it was an act of bankruptcy, might, if it was satisfied with the sufficiency of the deed, decline to make a receiving order; one would have expected this, even if there had been nothing more in the Act, and nothing in the previous bankruptcy legislation relating to such deeds. But, in fact, special provisions for deeds of this kind were made in some of the Bankruptcy Acts before that of 1869. By the Act of 1869 these deeds were done away with altogether, and instead of them it was required that, in order to make a valid arrangement between a debtor and his creditors, there should be a proceeding for liquidation or composition under the 125th or the 126th sections of the Act. What has the Act of 1883 done? Has it in any way reverted to the old practice before the Act of 1869, or in what direction has it gone? It has allowed these liquidation or composition arrangements to continue, only under greater restrictions. Under the Act of 1869, if the Court found that the provisions of the Act had been complied with the resolution was to be registered, and then it became binding, and prevented the Court from exercising any discretion for the purpose of saying whether it was beneficial for the creditors. But, under sub-s. 2 of s. 18 of the present Act, no resolution passed by the creditors, even if the provisions of the Act are followed, will be binding, unless it is approved by the Court, and that is a very strong additional restriction first imposed by the Act of 1883, and, in my opinion, most wisely introduced and

most beneficial. It does not facilitate liquidations by arrangement or composition, but it imposes a very strong additional restriction on their becoming binding upon dissenting creditors. It gives the Court the power, and imposes upon the Court the duty, of saying whether, although the statutory majority of the creditors has approved of the proposed scheme, it is such a scheme as it ought to sanction in order to make it binding upon the minority of the creditors. It would, in my opinion, be most extraordinary if, when the Act has introduced all these restrictions on arrangements with creditors, and has made the execution of such a deed outside the Court an act of bankruptcy, such a deed could under certain circumstances be made binding without the approval of the Court, there being no provision in the Act expressly pointing to this. We are really asked under these words "sufficient cause" to enable that to be done which would entirely relieve the debtors from all the responsibilities which are imposed upon them by the subsequent sections of the Act. In my opinion, it would be contrary to the scope and object of the Act for the Court to assume to itself under those words power to sanction such a deed made outside the Act, when, but for the approval of the Court, it would of itself, as an act of bankruptcy, be a sufficient ground for making a receiving order. In my opinion, the registrar was quite right in making the receiving order.

LINDLEY, L.J. I also am of the same opinion. I think this case is one of very considerable importance, because it really is an invitation to the Court to say that by this method the majority of the creditors can bind the minority to a scheme for the liquidation of the debtors' affairs, without complying with those sections of the Act which prescribe the proper method of proceeding when that is the real object of the creditors. One cannot help feeling the force of the observation that one creditor is really thwarting the wishes of the majority; but, on the other hand, one cannot also help seeing that this is an attempt by the minority to screen the debtors from a public examination, a thing which, it appears to me, they are not entitled to do, unless the Act confers the right. No doubt the case comes literally within the words of sub-s. 3 of s. 7, but when we find, as we do,

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in the Act very careful provision made for avoiding the very thing which is now sought to be done, viz., the carrying schemes for liquidation into effect without previous investigation, and the approval of the Court, and we are asked, under cover of these general words, to set aside that parliamentary scheme and to provide another, I think we should be going contrary to the true principle of construing Acts of Parliament if we were so to construe those words. It appears to me that, although it may be within the words, looking at them apart from the context, no sound principle of construction would justify us in holding that this arrangement is within the 3rd sub-section. The appeal must therefore be dismissed with costs.

Chalmers asked that the costs of the official receiver might be provided for out of the deposit or out of the estate of the debtors: *Ex parte Ward.* (1)

Cooper Willis, Q.C. The official receiver ought not to have appeared; he represents no one. If he is to appear in every case in which he is served, merely to ask for costs, the costs of bankruptcy proceedings will be immensely swollen. The receiver has no estate vested in him; he has no more interest than the registrar of the Court had under the old practice.

Chalmers. There has been no stay of proceedings under the receiving order; the receiver has been acting. He was a necessary party to the appeal. He is a quasi-public prosecutor under the Act.

Cooper Willis, Q.C. At any rate the receiver should not be allowed more than 40*s.* costs. It is not his duty to attend the hearing of an appeal; certainly not to take part in it. He has no official knowledge of the facts, and in this case he has not even filed an affidavit.

Chalmers. The appellants have really no interest in the question of costs.

Baggallay, L.J. We think it desirable to lay down a rule by which under ordinary circumstances the Court will feel itself bound, although of course it will be always open to the Court,

(1) 15 Ch. D. 292.

when there are special circumstances, to deviate from it. We think it very desirable that costs should not be incurred by the unnecessary appearance of any one, and more especially by the unnecessary appearance of the official receiver, and as a general rule we think that the official receiver ought not to appear, unless there is something special for him to bring under the cognizance of the Court, of which special circumstances the Court will judge at the time when the application for costs is made. There may be also particular costs as to which the deposit required by the 128th rule to be made on the presentation of a petition may not be a sufficient protection to him, and as to which a special provision may have to be made. In the present case, however, having regard to all the circumstances, and to the fact that this is the first occasion on which this matter has been brought under the attention of the Court, we will allow the official receiver to have his costs out of the estate. Mr. Winslow's client will take his costs out of the deposit, and, if that is more than sufficient, of course the balance will be returned to the appellants, but, if it is not sufficient, the balance will come out of the estate.

Cotton and Lindley, L.JJ., concurred.

Solicitors for appellants: *Hickin & Graham, agents for R. Simey, Sunderland.*

Solicitors for petitioning creditor: *Brownlow & Howe, agents for A. T. Crow, Sunderland.*

Solicitor for official receiver: *Solicitor to the Board of Trade.*

W. L. C.

1884
May 28.

EX PARTE TAYLOR. IN RE LACEY.

Bankruptcy—Petition—Secured Creditor—Valuation of Security—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6 (*sub-s.* 2); *sched.* 1, *rr.* 10, 12; *sched.* 2, *rr.* 9, 10, 11, 12, 13.

When a secured creditor presents a bankruptcy petition against his debtor it is not necessary that the estimate given by the petitioner of the value of his security should be a true estimate; but, if an adjudication is made, the trustee in the bankruptcy will be entitled to redeem the security at the amount of the petitioner's estimate.

APPEAL from the Wandsworth County Court.

On the 29th of March, 1884, H. R. Taylor presented a bankruptcy petition in the Wandsworth County Court against W. R. Lacey. The petition stated that Lacey was indebted to the petitioner in the sum of 59*l.* 19*s.* 4*d.*, being the amount of a final judgment obtained by him in the Queen's Bench Division on the 11th of March, 1884. The act of bankruptcy alleged was the failure of Lacey to comply with a bankruptcy notice. The petition stated that the petitioner held security for the payment of a part of the 59*l.* 19*s.* 4*d.*, viz., a mortgage of some freehold land at Wandsworth, granted to him by Lacey on the 14th of July, 1883, to secure 25*l.* and interest, and that the petitioner estimated the value of the security at the sum of 9*l.* On the hearing of the petition evidence was taken with the view of shewing that the petitioner had undervalued his security, and that, if he had put a fair value on it, the balance due to him would have been less than 50*l.*, so that he would not have been entitled to present a petition. The petitioner was examined, and he deposed that he had no knowledge as to the real value of the property; he had not seen the land. Lacey was examined, and he deposed that the value of the land was 60*l.* He had let it at 3*l.* a year ground rent. He was a surveyor and accustomed to value land, and had had experience, particularly in the value of land in that neighbourhood. He had put a value on the land according to the rent. The registrar dismissed the petition, on the ground that the value of the security held by the petitioner was such as to bring the balance of the debt due to him under 50*l.*

The petitioner appealed.

Atherley Jones, for the petitioner. Sect. 6 (sub-s. 2) of the Bankruptcy Act, 1883 (1), requires that a petitioning creditor shall, if he holds security, give an estimate of its value, but it does not say that he must state the true value. If the petitioner underestimates the value of his security, the result will be that, if there is a bankruptcy, the trustee will be entitled to take the

(1) Sect. 6, sub-s. 2: "If the petitioning creditor is a secured creditor, he must, in his petition, either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated, in the same manner as if he were an unsecured creditor."

Sched. 1, rule 10: "For the purpose of voting (at meetings of creditors), a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt, he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence."

Rule 12: "It shall be competent to the trustee or to the official receiver, within twenty-eight days after a proof estimating the value of a security as aforesaid has been made use of in voting at any meeting, to require the creditor to give up the security for the benefit of the creditors generally on payment of the value so estimated, with an addition thereto of 20 per cent: Provided, that where a creditor has put a value on such security, he may, at any time before he has been required to give up such security as aforesaid, correct such valuation by a new proof, and deduct such new value from his debt, but in that case such addition of 20 per cent. shall not be made if the trustee requires the security to be given up."

Sched. 2, rule 9: "If a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized."

Rule 10: "If a secured creditor surrenders his security to the official receiver or trustee for the general benefit of the creditors, he may prove for his whole debt."

Rule 11: "If a secured creditor does not either realize or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

Rule 12 (a): "Where a security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value."

Rule 13: "Where a creditor has so valued his security, he may at any time amend the valuation and proof

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security at the value stated in the petition: sched. 1 to the Act, rules 10, 12; sched. 2, rules 9, 10, 11, 12, 13. This is a sufficient check on the creditor, and affords ample protection to the creditors generally.

F. Cooper Willis, for the debtor. If a creditor may put any value he pleases on his security great hardship may result to the debtor. A creditor, having ample security, might wish to make his debtor a bankrupt from malicious motives.

[A. L. SMITH, J. The same thing might happen if the creditor surrendered his security.]

The rules in the schedules have no application until after a receiving order or an adjudication has been made.

CAVE, J. I think that the appeal must be allowed, and the petition be remitted to the registrar to be dealt with on its merits. Sub-s. 2 of s. 6 only requires the creditor to "give an estimate of the value of his security," and this the appellant has done. He can, if he pleases, give up his security for the benefit of the creditors. He is bound by the estimate which he makes; and, in this case, unless he obtains leave to amend his estimate, which he can only do if he has made a bonâ fide mistake, he must give up his security to the trustee for 9*l*. Sect. 6 does not require that the estimated value shall be the true value. I cannot see that any hardship will result to the debtor from this construction. If the value of the security is underestimated, the other creditors will, in the event of a bankruptcy, get the benefit of it.

SMITH, J., concurred.

Solicitors for petitioning creditor: *Hurford & Taylor.*
Solicitor for debtor: *R. Chamberlain.*

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on shewing to the satisfaction of the trustee, or the Court, that the valuation and proof were made bonâ fide on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the trustee shall allow the amendment without application to the Court."

W. L. C.

[IN THE COURT OF APPEAL.]

1884
March 31.

WHALLEY *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Watercourse—Right to Protection against Flood—Adjoining Landowners—Liability for sending Water on adjoining Lands.

By reason of an unprecedented rainfall a quantity of water was accumulated against one of the sides of the defendants' railway embankment, to such an extent as to endanger the embankment, when, in order to protect their embankment, the defendants cut trenches in it by which the water flowed through, and went ultimately on to the land of the plaintiff, which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater extent than it would have done had the trenches not been cut. In an action for damages for such injury the jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently:—

Held, that though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and that they were therefore liable.

THE defendants were proprietors of a railway which ran from Brecon Station to Southport, and also for some distance from east to west over a flat country on a low embankment by which it was carried a little higher than the adjoining lands, and on each side of which was a ditch for the purpose of draining the railway. The surrounding land declined or sloped from the south-east to the north-west, so that land on the north-west side of the railway embankment at that part was on a lower level than that on the south-east side of it. The plaintiff was a farmer in the occupation of lands on the north-west side of the railway, but separated from it by lands belonging to other persons.

On the 30th of August, 1881, there was an unprecedented storm and rainfall, which blocked up and over-flooded the drains, so that a large quantity of water became dammed up against the south-east side of the railway embankment. This water having afterwards risen so as to expose the embankment to danger, the defendants caused trenches to be made in the embankment, by which the water was enabled to escape to the north-west side of the railway, and from thence to flow into the adjoining land, and ultimately to that of the plaintiff, where it damaged his crops.

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The action was brought for the injury which the plaintiff had sustained by the defendants so causing the water to come on his land. It was tried at the Liverpool Summer Assizes of 1882, before Day, J., when the jury found that the defendants cut the trenches and caused the flood-water to flow over the land of the plaintiff, but that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently. They also found that the land of the plaintiff was injured by the water that so came through the trenches to the extent of 130*l.* beyond what it would have been injured if the trenches had not been cut. On these findings the learned judge gave judgment for the plaintiff for 130*l.*

The defendants appealed.

C. Russell, Q.C., and *Henn Collins, Q.C.*, for the defendants. What the defendants did was not an actionable wrong, but what they were entitled to do in order to protect their railway embankment which they had erected under the powers of their Railway Act, and which they were authorized by such statute to maintain. The water had not come on their land by any act of theirs, and the defendants, therefore, were not in the position of persons who had brought water or any dangerous thing on their own land and were bound to take care it did not escape and injure their neighbour. They were entitled to deal with their embankment, which was their property, in the ordinary way of user, and to do what was required to keep it as a railway embankment.

The case, therefore, in principle is the same as that of *Smith* v. *Kenrick* (1), and there the removal of the horizontal bar of coal in the defendant's colliery was similar to the opening of the trenches in this case, and yet though the defendant there knew that the effect of that bar being removed would necessarily cause a quantity of water to flow into his colliery, and from thence into the adjoining colliery of the plaintiff, which was on a lower level, it was held that he was not responsible for the injury the plaintiff sustained by the inundation of his colliery through such removal of the bar, because the defendant so removed it for the purpose of

(1) 7 C. B. 515; 18 L. J. (C.P.) 172.

getting coal and working his mine, as he had a right to do, more advantageously to himself. *Baird* v. *Williamson* (1) followed the law as laid down in *Smith* v. *Kenrick* (2), and decided that the owner of a mine was not liable for water flowing by gravitation from works used for the purpose of getting the minerals. That case, no doubt, shews that such owner of a mine was liable for pumping up water and so passing it into an adjoining mine, because then he was bringing the water on his land, and that distinction is pointed out in *Rylands* v. *Fletcher*. (3) The water in the present case was not brought on this land by the defendants, it was a sort of common enemy, as said by Lord Tenterden in *Rex* v. *Pagham Commissioners* (4), against which the defendants were entitled to protect their property, even though the plaintiff was thereby prejudiced and sustained a greater damage than he otherwise would have suffered: *Nield* v. *London and North Western Ry. Co.* (5) and *Menzies* v. *Earl of Breadalbane*. (6) In *Scott* v. *Shepherd* (7), in which the question was whether trespass would lie against the person who originally threw a squib, which, after having been thrown about in self-defence by other persons, ultimately struck the plaintiff, Gould, J., said, "had the squib been thrown into a coach full of company the person throwing it out again would not have been answerable for the consequences." That is an authority that the first receiver of what may be called a common enemy is not bound to bear the misfortune alone, but may pass it on to others. It was a question of fact for the jury whether the mode used by the defendants for passing this mischief on was a reasonable one to use or not.

Gully, Q.C., and *Part*, for the plaintiff. The jury found that the defendants cut the trenches and caused the water to flow over the land of the plaintiff. That is an actionable wrong sufficient to entitle the plaintiff to recover in this action, and it is immaterial whether the cutting was reasonably necessary or not for the protection of the defendants' property. Mining cases, and the rights of working underground, are very different from the rights

(1) 15 C. B. (N.S.) 376; 33 L. J. (C.P.) 101.
(2) 7 C. B. 515; 18 L. J. (C.P.) 172.
(3) Law Rep. 3 H. L. 330.
(4) 8 B. & C. 359.
(5) Law Rep. 10 Ex. 4.
(6) 3 Bli. (N.S.) 414.
(7) 1 Sm. L. C. 8th Ed. 466.

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of surface-owners and surface operations. This is pointed out by Hall, V.C., in *Crompton* v. *Lea*. (1) Therefore the cases which have been cited as to mines do not apply. It has been admitted that the defendants would not have had a right to pump up the water and so force it on to the plaintiff's land, but the water here was penned back by an embankment made by the defendants, and when the water was let out by the defendants and caused to flow through these cuttings, the flow was not the natural flow of such water, but one artificially made by the act of the defendants. Whether the railway embankment was erected by statute or not it was no better than an embankment lawfully made by a person on his own land, and the penning back and accumulation of the water behind such embankment was only a lawful accumulation of the water, but that would give no right to the defendants to cut the trenches and to pass the water from where it was comparatively safe to the plaintiff on to his land to the injury of his crops. There is a great difference between a right to a landowner to protect his property against a common enemy, as was the case in *Nield* v. *London and North Western Ry. Co.* (2) and *Rex* v. *Pagham Commissioners* (3), and a right to pass such enemy on to the land of a neighbour. There is no decision or authority to the effect that a person is allowed to save his own property from injury by doing that which would injure his neighbour; on the contrary, he must take care not to send any injurious thing from his own land on to his neighbour's land: *Hurdman* v. *North Eastern Ry. Co.* (4), where the defendants were held liable for having by an artificial erection on their land caused water to flow into the plaintiff's land in a manner in which it would not but for such erection have done.

Henn Collins, Q.C., replied.

BRETT, M.R. In this case the defendants are the owners of a railway standing at the place in question upon a slight embankment, which they were authorized by Act of Parliament to make and to use as a railway embankment with a railway on it. That embankment at that place was upon sloping ground, so that on

(1) Law Rep. 19 Eq. 115, at p. 126.
(2) Law Rep. 10 Ex. 4.
(3) 8 B. & C. 355.
(4) 3 C. P. D. 168.

one side of it the ground was higher than on the other side. An extraordinary storm of rain arose, by which the land on the upper side was flooded; and the water being stopped by the embankment rested against it in a body, so that people might reasonably suppose it would endanger the safety of the embankment. Under those circumstances the defendants cut trenches or openings through the embankment, the necessary effect of doing which was, that the water passed through those openings on to the plaintiff's land in a different way from what it would have done if it had percolated through the embankment, as it probably would have done, and by reason of its so passing through these openings in such different manner it damaged the plaintiff's land.

The question is whether the defendants are liable to the plaintiff.

Now the jury found that from the way in which the defendants let the water through, it did more damage to the plaintiff's land than if it had been allowed to percolate through without their having done anything; but then they also found that if the defendants had only to consider the preservation of their own land, what they did was a reasonable thing to do, and it was not done by them negligently.

Therefore the proposition before us comes to this: when the water by an extraordinary misfortune had come to rest against the defendants' property, had they a right, in order to save their own property, to do that, the necessary effect of which was to injure their neighbour's property?

Several cases have been cited. In some it was where one has property in such a position with regard to his neighbour that it must be injured if the neighbour use his property at all in a natural way; if the neighbour were not to be allowed to use his property in a natural way one would be putting a burden upon him by reason of the defect in one's own property, and would be transferring that defect to his. That is the case of mines; where the person who has the lower mine has it in such a defective position that it must suffer unless he can prevent his neighbour from using his mine in the ordinary way. That I take it the law will not allow; so that if the neighbour only uses his property in the ordinary and natural way he is not liable for the damage the

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other may have suffered from what was really a defect in his own property.

Then we come to the case of having property which is subject to this defect, that unless you can prevent the injury which the ordinary course of nature will bring upon it by transferring that injury to your neighbour's property, your property must suffer as the natural consequence of its position. That is the case of *Menzies* v. *Earl of Breadalbane* (1), where property was so situated with regard to a river that if the river was left alone with its ordinary flow of water, it must in the course of nature eat away the property or occasionally overflow it. If the owner of such property, in order to cure that defect, were to do something to his land which by turning the stream out of its ordinary course would throw that defect on his neighbour's land, he would, I think, according to ordinary principles of law, become liable to pay the damages this would occasion, and further be prevented from continuing to do it by an injunction.

There are two other cases which have been decided. An extraordinary danger threatens you; you have a right to defend yourself against it before it has occurred to you. To protect yourself, and only for the purpose of so protecting yourself, you prevent the danger from happening to you, but the danger is so far common that the necessary consequence of its being prevented from happening to you is that it will happen to your neighbour. In so acting in defence of yourself, or of your property, you have done nothing by any act intended to injure your neighbour, and you are not answerable because the danger which has been diverted from you has done mischief to somebody else. The cases to that effect are those of *Nield* v. *London and North Western Ry. Co.* (2) and *Rex* v. *Pagham Commissioners.* (3)

But now we come to a case of this kind—There is something existing which is injurious to your property, and the question is whether, by any active act of yours in order to get rid of that mischief, you are entitled to do something which would cause a misfortune to your neighbour. Now it has been held that if a person brings something on to his own land, which if he does not

(1) 3 Bli. (N.S.) 414. (2) Law Rep. 10 Ex. 4.
(3) 8 B. & C. 355.

take precaution may produce danger to his neighbour, he is liable though he does not do any second act whatever, because he did the act which brought about the danger, and he failed to guard against it. One of these cases is where a man brings water on to his own land, and dams it up, so that if it breaks away it must be a danger to his neighbour, and must do him injury: there such man is liable though he does nothing to let the water out—but it bursts away without any subsequent act of his.

But then it is suggested that if a person has not brought the danger on his land it makes a difference. So it does. If he has not brought the danger there, and without any act of his it breaks through his land on to his neighbour's land, I take it he is not liable. In that case both have suffered from a common extraordinary danger, but one has suffered before the other; that is all.

But now comes this question, the danger has not been brought by a person on his own land, but it has come there—an extraordinary danger, which, if left standing there, will injure his property, but not that of his neighbour. Can he then, in order to get rid of and cure the misfortune which has so happened to himself, do something which will transfer that misfortune to his neighbour? That seems to me to be contrary to the well known maxim that you must not, when you have the choice, elect to use your property so as to cause injury to your neighbour.

The present case is a little more complicated than that. In this case the water endangered the embankment, and moreover it would have gone on to the plaintiff's land in any event, but then if it had been left alone and allowed simply to percolate through the embankment, even though all of it would have gone on the plaintiff's land, it would have gone without doing the injury which was done by reason of its passing through the cuttings which the defendants made. The defendants did something for the preservation of their own property which transferred the misfortune from their land to that of the plaintiff, and therefore it seems to me that they are liable. But then it is said that the defendants are not, because they have only used the railway in the ordinary course a railway would be used, and therefore the

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case comes within the principle that I endeavoured first to state, namely, that the plaintiff had land which had a defect in it by reason of its neighbourhood to a railway which had to be used in the ordinary way of railways. It is true that the owner of land next to a railway cannot recover, because smoke, which has come from the engines of trains without any negligence on the part of the railway company, has destroyed or injured such owner's fruit or trees, because that arises from using the railway according to the ordinary nature of railways; but it is impossible to my mind to say that to cut holes through a railway embankment is the ordinary use of it, on the contrary, the more holes are cut through it, the less fit is it for use as an embankment. I think this case comes within the general principle I have enunciated. An extraordinary misfortune happened, it fell upon the defendants, and if they had allowed things to remain as they were, they would have been the sufferers; but in order to get rid of the misfortune which had happened to them, and which, rebus sic stantibus, would not have injured the plaintiff, they did something which brought an injury upon the plaintiff. Under those circumstances it seems to me the defendants are liable; and the judgment of Day, J., was right, and ought to be affirmed.

BAGGALLAY, L.J. I so entirely agree with the observations which the Master of the Rolls has made as to the principles applicable to this case, as illustrated by the cases of *Menzies* v. *Earl of Breadalbane* (1), *Rex* v. *Pagham Commissioners* (2), *Rylands* v. *Fletcher* (3), and *Nield* v. *London and North Western Ry. Co.* (4), that I shall confine my few observations to the questions with which we have to deal.

The railway embankment, which has been under consideration, runs from east to west, and the land slopes from the south to the north. There had been an extraordinary rainfall, and there was an accumulation of water on the southern side of the railway embankment to such an extent that there was great danger of the embankment itself being washed away. Under these circumstances the defendants cut a number of trenches

(1) 3 Bli. (N.S.) 414.
(2) 8 B. & C. 355.
(3) Law Rep. 3 H. L. 330.
(4) Law Rep. 10 Ex. 4.

across the embankment, so that the water passed readily from the southern side on to the northern side, and there flowed down over the intervening land and damaged the plaintiff's property.

The jury found as a fact that what the defendants did caused the water to flow on to the plaintiff's land and resulted in damage to him; and they found, in the second place, that the defendants had acted reasonably with a view to save their own embankment.

Now we have to apply the principles which have been just enunciated. We find the defendants in this position: they have not prevented the flow of the water upon their own land, for the water had already got upon their own land; and, if it had remained there, it might have been attended with danger to their embankment and to the lands of their neighbours. The defendants could have left the water to take its own course, and then, if it had produced any amount of damage to the plaintiff, I really do not see how, under the circumstances, he could have had any right against them. But, on the other hand, if, without leaving the water to take its own course, they take upon themselves to do that which they think best—(whether they think it best for themselves or their neighbour, or for both)—they must take the risk of that which they do being found by the jury, however reasonably done as regards their own embankment, to have caused damage to the neighbour whose land the water so flowed over. I think that is the result of the principle enunciated in several of the cases to which our attention has been drawn at considerable length; and when one has arrived at the facts of the case, it appears to me that the application of the principle is clear. I agree that the present appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. This case has raised points of some difficulty and some nicety.

Now let us see first of all what this is. This is a case in which the defendants have made an embankment, and against that embankment water from an unusual storm of rain has accumulated to such an extent, and to such a depth, as to endanger the embankment apparently, and to render it reasonable to those who could not foresee how long this storm would last, to get rid of some of the water. Have the defendants a right, in order to

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save their own embankment, to cut holes through it, and to turn the water from off their land so as to damage their neighbour, and not make him any compensation? Primâ facie I take it the defendants should justify what they have done, and it is material that no authority can be found in their favour. It is said that *Smith* v. *Kenrick* (1) and cases of that kind are in their favour. I cannot think that at all. I think the difference between this case and those has been pointed out by the Master of the Rolls, and in the case of *Hurdman* v. *North Eastern Ry. Co.* (2) Cotton, L.J., says: "But excavating and raising the minerals is considered the natural use of mineral land, and these decisions are referable to this principle, that the owner of land holds his right to the enjoyment thereof subject to such annoyance as is the consequence of what is called the natural user by his neighbour of his land, and that when an interference with this enjoyment by something in the nature of nuisance (as distinguished from an interruption or disturbance of an easement or right of property in ancient lights, or the support for the surface to which every owner of property is entitled) is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbour of his land." Then the Lord Justice goes on to refer to some cases to shew that that is so. It appears to me this case is not analogous to those. It is more analogous to the Scotch case of *Menzies* v. *Earl of Breadalbane* (3), and the case of *Nield* v. *London and North Western Ry. Co.* (4) It seems to me established by those cases that if an extraordinary flood is seen to be coming upon land the owner of such land may fence off and protect his land from it, and so turn it away, without being responsible for the consequences, although his neighbour may be injured by it. *Rex* v. *Pagham Commissioners* (5) is another step in the same direction. Of course there is a difference between protecting yourself from an injury which is not yet suffered by you, and getting rid of the consequences of an injury which has occurred to you. Then there is the squib case in *Scott* v. *Shepherd* (6), in which Gould, J., says, that if a man throws a

(1) 7 C. B. 515; 18 L. J. (C.P.) 172.
(2) 3 C. P. D. 168, at p. 174.
(3) 3 Bli. (N.S.) 414.
(4) Law Rep. 10 Ex. 4.
(5) 8 B. & C. 355.
(6) 1 Sm. L. C. 8th Ed. 466.

squib into a coach, a passenger in the coach may throw it out and not be responsible for the consequences. That is perhaps in point of principle a little nearer to the present case, and there is some little difficulty in seeing a common principle which will explain all cases. We must look at the broad question, which is, whether a landowner on whose land there is a sudden accumulation of water, brought there without any fault or act of his, is at liberty actively to let it off on to the land of his neighbour without making that neighbour any compensation for damages, because the landowner, by doing so, has been able to save his own property from injury? I can see no authority for that, and it appears to me the general rights and duties of landowners are decidedly against it. For these reasons, I agree that the view taken by Day, J., is right, and that this appeal must be dismissed.

BRETT, M.R. I wish to add that I do not adopt Mr. Gully's distinction between operations underground and on the surface. I think if a man be so situated with regard to his neighbour that by an ordinary act in the use of his neighbour's land, such as by deep ploughing, the ordinary flow of water is sent from that land on to his land he would be in the position of having his land subject to the defect, and therefore could not recover for the injury he might so suffer. And I should like to say with regard to the squib case put by Gould, J., in *Scott* v. *Shepherd* (1), that the squib was a danger to all, and was never in the possession of the person who was in the coach, but was flying about, and by his throwing it out of the coach where he was he only prevented it from coming into his possession just as much as if he struck it with a bat.

Appeal dismissed.

Solicitors for plaintiff: *Gregory, Rowcliffes, & Co., for Woodcock & Walmsley, Wigan.*

Solicitors for defendants: *Clarke, Woodcock, & Ryland, for C. Moorhouse, Manchester.*

(1) 1 Sm. L. C. 8th Ed. 466, at p. 473.

W. P.

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May 20.

THE QUEEN *v.* THE JUDGE OF THE SOUTHEND COUNTY COURT AND ANOTHER.

County Court—Jurisdiction—Maritime Causes—Actions under 50*l.*—*Claims under Charterparties—County Courts Admiralty Jurisdiction Act,* 1868 (31 *&* 32 *Vict. c.* 71), *ss.* 3, 5—*County Courts Admiralty Jurisdiction Amendment Act,* 1869 (32 *&* 33 *Vict. c.* 51), *s.* 2.

The statutes 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, do not deprive County Courts not having Admiralty jurisdiction of their jurisdiction to try actions to recover freight under charterparties where the amount claimed is less than 50*l.*

RULE obtained by the plaintiff in an action of *Perfect* v. *Poynter* calling upon the judge of the Southend County Court and the defendant to shew cause why the county court judge should not hear and determine the case.

The plaintiff's claim was for 7*l.*, balance of freight under a charterparty and bills of lading. The particulars were:—"To balance of freight due from defendant on carriage of cargo of potatoes by sea per *Hyperion*."

Admiralty jurisdiction over the district of the Southend County Court is, by Order in Council made under 31 & 32 Vict. c. 71, vested in the City of London Court.

The county court judge, being of opinion that the claim came within the terms of 32 & 33 Vict. c. 51, s. 2 (1), held that he had no power to try the cause under his ordinary jurisdiction.

(1) By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 2, county courts may be appointed by Order in Council to have Admiralty jurisdiction.

By s. 3, "Any county court having Admiralty jurisdiction shall have jurisdiction . . . . to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes):—

(1.) As to any claim for salvage—any cause in which the value of the property saved does not exceed 1000*l.*, or in which the amount claimed does not exceed 300*l.*

(2.) As to any claim for towage, necessaries, or wages—any cause in which the amount claimed does not exceed 150*l.*

(3.) As to any claim for damage to cargo, or damage by collision—any cause in which the amount claimed does not exceed 300*l.*

(4.) Any cause in respect of any such claim or claims as aforesaid, but in which the value of the property saved, or the amount claimed, is beyond the amount

Laing, for the defendants, shewed cause. The claim in the present case arises out of an agreement in relation to the carriage of goods in a ship within s. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869. It is admitted that prior to 1868 the county court judge had jurisdiction to try it, the amount claimed being under 20*l.*; also that the County Courts Admiralty Jurisdiction Act, 1868, did not interfere with his jurisdiction, because s. 5 refers only to the "Admiralty causes" defined in s. 3, and this is not one of them. But by s. 2 of the Amendment Act, 1869, which is to be read as one with the principal Act, a new class of Admiralty causes is created; and s. 5 of the Act of 1868 applies to prohibit any county court from trying them except the court having Admiralty jurisdiction over the district. These causes, which are termed "maritime causes" in the Amendment Act, have been held to be Admiralty causes within s. 6 of the principal Act, which enables Admiralty causes to be transferred from the county court to the High Court of Admiralty: *Re Swan* (1). In *Cargo ex Argos* (2), in which case *Simpson* v. *Blues* (3) was dissented from, the new maritime causes created by s. 2 of the Amendment Act are treated as Admiralty causes, and s. 26 of the Act of 1868, which gives an appeal in "Admiralty causes" to the High Court of Admiralty, is said to apply to them. [He also referred to *The Alina*. (4)]

limited as above-mentioned, when the parties agree by a memorandum signed by them, or by their attorneys or agents, that any county court having Admiralty jurisdiction, and specified in the memorandum, shall have jurisdiction."

By s. 5. "From and after the time specified in such Order in Council under this Act, appointing a county court to have Admiralty jurisdiction within any district, or the time from which this Act shall have effect in and throughout that district, no county court, other than the county court so appointed, shall have jurisdiction within that district in any Admiralty cause, &c."

By the County Courts Admiralty Jurisdiction Amendment Act, 1869, (32 & 33 Vict. c. 51), s. 1, "This Act shall be read and interpreted as one Act with the County Courts Admiralty Jurisdiction Act, 1868."

Sect. 2. "Any county court appointed, or to be appointed, to have Admiralty jurisdiction shall have jurisdiction .... to try and determine the following causes:—

(1.) As to any claim arising out of any agreement made in relation to the use or hire of a ship, or in relation to the carriage of goods in any ship, ... provided the amount claimed does not exceed 300*l.*

(1) Law Rep. 3 A. & E. 314.

(2) Law Rep. 5 P. C. 134.

(3) Law Rep. 7 C. P. 290.

(4) 5 Ex. D. 227.

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C. R. Tyser, for the plaintiff, supported the rule. There is nothing in the Acts of 1868 and 1869 to take from county courts the jurisdiction they always had of trying actions of contract in which the amount claimed was under 20*l.* Sect. 5 of the first Act clearly refers only to the Admiralty causes specified in s. 3. In the Amendment Act the causes mentioned in s. 2 are styled "maritime causes," for the purpose of distinguishing them from the Admiralty causes to which the principal Act refers.

[He was stopped.]

HAWKINS, J. I am of opinion that the county court judge was wrong in refusing to try this action. It is conceded that the claim set forth in the particulars could have been entertained in the county court before the passing of the Acts of 1868 and 1869 conferring Admiralty jurisdiction upon county courts. It is necessarily so conceded, because s. 58 of the County Courts Act, 1846, gave jurisdiction "in all pleas in personal actions where the debt or damage claimed is not more than 20*l.*, whether on balance of account or otherwise." It is conceded also that the Act of 1868 (31 & 32 Vict. c. 71) did not affect the then existing jurisdiction of county courts. Sect. 3 enables county courts having Admiralty jurisdiction to try what are termed "Admiralty causes" in four specified cases; and wherever the words "Admiralty cause" occur in the Act they must, by the interpretation given to them by s. 3, refer to one of those four cases. By s. 5, where Admiralty jurisdiction is conferred upon a county court, no other court shall have jurisdiction within the district "in any Admiralty cause." The claim in the present case was not in respect of any of the four matters specified in s. 3, and the jurisdiction given by s. 58 of the County Court Act, 1846, is therefore not taken away. Sect. 2 of the Amendment Act of 1869 (32 & 33 Vict. c. 51) is mainly relied upon as taking away the jurisdiction. I am of opinion that the effect of that section, so far from limiting the ordinary jurisdiction of county courts, is to give additional jurisdiction to courts having Admiralty jurisdiction where the amount of any claim arising out of an agreement made in relation to the use or hire of a ship, &c., does not exceed 300*l.* I can see nothing in the Acts of 1868 and 1869 to take away the jurisdiction which the county court undoubtedly

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had, under the original Act of 1846, to try this claim. I am of opinion that this rule should be made absolute.

SMITH, J. This case raises a question of importance to judges of county courts not having Admiralty jurisdiction, namely, whether they are, or are not, bound to try cases in which the claim is for less than 50*l.*, and arises out of a contract relating to the use or hire of, or carriage of goods in, any ship. I am of opinion that the view taken by the county court judge was wrong. It is conceded that down to the year 1868 he would have had jurisdiction to try this case; but it is contended that his jurisdiction has been taken away by the Acts of 1868 and 1869. I think it has not. I may remark in the first place that the Act of 1868 was passed in order to confer jurisdiction on county courts, not to take it away. The existing jurisdiction is left by that Act exactly where it was, and in certain specified causes new jurisdiction is conferred. What are termed "Admiralty causes" in the Act are set out in s. 3; they are what were known as "Admiralty causes" in the old Courts of Queen's Bench, Common Pleas, and Exchequer; and it is perfectly clear that the present action is not one of them. Had the matter rested there, it is clear that the Act of 1868 did not take away any jurisdiction; but it is said that the jurisdiction was taken away by the Act of 1869, read together with s. 5 of the Act of 1868. The Act of 1869 is also an Act passed to confer jurisdiction, not to take it away. Jurisdiction in Admiralty causes having been conferred by the legislature upon certain Courts, all that the Act of 1869 has done is to add jurisdiction up to 300*l.* with respect to claims arising out of contracts relating to the use or hire of ships, or the carriage of goods in them. I cannot find a syllable in either of those Acts depriving county courts of their jurisdiction to try actions of contract up to 50*l.* It was strenuously argued for the defendants that the new jurisdiction conferred by s. 2 of the Act of 1869 was in reality jurisdiction in respect of Admiralty causes, and that this is therefore an Admiralty cause to which s. 5 of the Act of 1868 applies, and as such could only be tried by the Court having Admiralty jurisdiction over the district in which it arose. Several

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cases were cited in support of that contention. There is no express decision that a claim under 50*l.* brought in the county court under a charterparty is an Admiralty cause within the meaning of the Act of 1868, but there are cases in which it has been held—possibly in somewhat loose phraseology—that actions brought under charterparties may be tried as Admiralty causes. But it is to be observed that in all those cases the claim was over 50*l.* I am not pressed with the case of *Cargo ex Argos.* (1) Looking carefully at the judgment of Montague Smith, J., it is clear that the learned judge did not decide this point, but dealt only with the point immediately before him. The action was for 135*l.*, and therefore could not have been brought in the county court except under the provisions of s. 2 of the Act of 1869. Where he says (2), "it certainly seems to have been intended by the scheme of the Act to treat these new maritime causes as Admiralty causes, and that the appeal should be to the Court of Admiralty," he plainly refers to causes in which the amount claimed exceeded 50*l.*, which prior to the Act of 1869 could not have been brought in the county court. I can see nothing in the Acts of 1868 and 1869 to take away from county courts their old jurisdiction in actions of contract up to 50*l.* I am of opinion that the cases cited for the defendants do not apply, and that this rule should be made absolute.

Rule absolute.

Solicitors for plaintiff: *Rollit & Sons.*
Solicitors for defendant: *Digby & Co., for Arthy, Rochford.*

(1) Law Rep. 5 P. C. 34. (2) Law Rep. 5 P. C. at p. 155.

W. A.

[IN THE COURT OF APPEAL.]

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May 30.

DYE *v.* DYE AND ANOTHER.

Husband and Wife—Separate Estate—Fee Simple of Wife—Agreement for Separate Use signed by Husband only—Renunciation of Marital Rights by Husband—Will of Wife—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 7.

In order that the fee simple of an intended wife may be affected with a trust for her separate use by an agreement made between the intended husband and wife before marriage, the agreement must be in writing and signed by the wife as well as by the husband; if it is signed by the husband alone, it is, owing to the Statute of Frauds, s. 7, invalid as a declaration of trust for separate use as to the fee simple, a husband having in his wife's land only an estate for the joint lives of himself and his wife with a possible estate by the curtesy; and upon the death of the wife without issue during her husband's lifetime, her heir-at-law, and not her devisee, will be entitled to the land of which she is seised in fee simple.

Mere renunciation by an intended husband of his marital rights in his wife's real property is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee.

Rippon v *Dawding* (Ambl. 565) commented on.

THIS action was commenced on the 27th of April, 1882, by the plaintiff to establish his title to, and recover possession of, a messuage and shop known as the London Porter House, situate in the parish of South Lynn, All Saints, within the borough of King's Lynn, in the county of Norfolk, and three cottages in the same parish, and two cottages in the parish of Wiggenhall St. Germans, in the same county, and to recover the rents thereof and mesne profits and, by consent, and by a master's order, the questions of law arising in the action were stated in the form of the following

SPECIAL CASE.

1. The plaintiff is the heir-at-law of one Susannah Mann, deceased, who, before her second marriage hereinafter mentioned, was Susannah Chesson, the widow of Carter Chesson of South Lynn, otherwise All Saints, King's Lynn, in the county of Norfolk. The defendants are the trustees appointed by the will of Susannah Mann, and devisees in trust of her real estate under the same.

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2. Carter Chesson, who died on the 5th of February, 1850, by his last will dated the 31st of October, 1840, devised all his real estate (which consisted of and comprised the property claimed in this action,) to his wife, Susannah Chesson for life, and after her decease to his son Carter Chesson, his heirs and assigns for ever, if his said son should survive his (the testator's) said wife; but in case his said son should die in the lifetime of his (the testator's) said wife, and without leaving lawful issue of his body him and his (the testator's) said wife surviving, then to the testator's said wife, her heirs and assigns, absolutely for ever.

3. The testator's said son died on the 2nd day of April, 1870, in the lifetime of the testator's said wife without leaving any issue, and Susannah Chesson then became absolutely entitled to all the said real estate.

4. Susannah Chesson, in 1856, intermarried with Robert Mann. Shortly before, and in consideration of, the then intended marriage, Robert Mann signed and delivered to Susannah Chesson a document in the following terms:—"Robert Mann, blacksmith of Wiggenhall St. Germans, in the county of Norfolk, solemnly covenants and agrees with Susannah Chesson, widow of the late Carter Chesson, that should she become the lawful wife of the above-named Robert Mann, he here by this agreement binds himself from having any legal or lawful claim upon the plate, linen, furniture, or household effects, or with receiving or disbursing the rents of her tenements and cottages, or giving orders for the repairs of the same, nor yet with any property whatsoever she is in possession of at the time of her marriage to him: in confirmation of this covenant and agreement he here places his hand and seal."

The foregoing document was signed by Robert Mann alone, and was attested by two witnesses.

5. Afterwards, during the coverture of the said Susannah Mann, in or about the year 1873, one Charles Miller offered, in consideration of a lease being granted to him of the messuage and shop hereinbefore mentioned, to pay Susannah Mann an increased rental in respect thereof, and thereupon, on the 11th of December, 1873, an indenture was made and entered into by and

between Robert Mann and Susannah his wife and Charles Miller, which, after reciting that Susannah Mann was entitled to the said messuage and shop to her and her heirs in fee simple, proceeded (so far as it is material to be here set out) as follows:—"And whereas the said Robert Mann and Susannah Mann have agreed to demise and lease unto the said Charles Miller, his executors, administrators, and assigns, the said messuage or tenement and hereditaments now used as a public-house and known by the name of , for the term of ten years at the rent of 30*l.*, such rent to be payable to the said Susannah Mann for her separate use, free from the debts, control, and engagements of her husband, and her receipt alone to be full discharge to the said Charles Miller, his executors, administrators, and assigns; now this indenture witnesseth that in pursuance of the said agreement, and in consideration of the rents and covenants hereinafter reserved and contained, and on the part of the said Charles Miller to be paid and performed, they the said Robert Mann and Susannah his wife by this deed intended to be acknowledged by the said Susannah Mann in pursuance of the Act for the abolition of fines and recoveries, do, and each of them doth, grant, demise, and lease unto the said Charles Miller, his executors, administrators, and assigns, all that capital messuage or tenement and shop now used as a public-house, and known by the sign of the , with the outbuildings, yard, and premises thereto adjoining and belonging: To have and to hold the said messuage, dwelling-house, shop, and premises, unto the said Charles Miller, his executors, administrators, and assigns, for the term of ten years from the 25th day of December instant, rendering and paying therefor yearly and every year the rent or sum of 30*l.* unto the said Susannah Mann, her heirs and assigns, for her separate use, free from the control, debts, and engagements of her present or any future husband, and that her receipt alone shall be sufficient discharge to the said Charles Miller, his executors, administrators, and assigns, in the same manner in all respects as if the said Robert Mann signed and discharged the same, by four equal quarterly payments on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year, the first payment to be made on the 25th day of

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March next, free from and clear from all rates, taxes, and charges whatsoever, parliamentary, parochial, or otherwise, (land tax and landlord's property tax alone excepted); And the said Charles Miller doth hereby for himself, his executors and administrators, covenant with the said Robert Mann, his heirs, appointees, and assigns, that he the said Charles Miller, his executors and administrators, will pay unto the said Susannah Mann the said yearly rent at the times and in manner hereinbefore mentioned for the payment thereof: And also that he the said Charles Miller, his executors, administrators, and assigns, will pay all rates, taxes, and outgoings, whether parliamentary, parochial, or otherwise, chargeable on or in respect of the said demised premises, (except land tax and landlord's property tax)."

The said deed was duly acknowledged by Susannah Mann in conformity with the provisions in that behalf of the Act of 3 & 4 Wm. 4, c. 74.

6. Charles Miller thereupon entered into possession of the said premises under the said lease, and thence until now has been and still is in possession thereof, and has paid rent for the same in pursuance of the terms of the said lease to Susannah Mann, till the time of her death hereinafter mentioned.

7. Robert Mann never interfered with the enjoyment and management by his wife, Susannah Mann, of her property, and neither before or after her decease, hereinafter mentioned, intermeddled with the same.

8. Susannah Mann had no issue by her marriage with Robert Mann, and on the 18th of May, 1881, she died leaving him surviving. She had made and executed a will or testamentary appointment dated the 5th of August, 1880, whereby, after reciting the document mentioned in paragraph 4, bequeathed all her plate, linen, furniture, and household effects, and her rents, and personal estate unto the defendants, and she also devised, bequeathed, and appointed unto the defendants, and their heirs, executors, administrators, and assigns, her messuage, cottages, and hereditaments, and all other the property of which she was in possession at the date of her marriage, upon certain trusts in the will particularly mentioned. The will or testamentary appointment of Susannah Mann was duly executed.

9. The defendants, as devisees in trust under the said will, had taken and been in possession of or received the rents of all the real estate in respect of which this action was brought since the death of the testatrix, and contended that the testatrix had power to devise her said real estate to them. And they further contended that in any case they were entitled to receive and retain the rents accruing due under the lease to Charles Miller, of the 11th of December, 1873, from the date of the death of Susannah Mann. The plaintiff denied that the testatrix had any power to devise her real estate, and claimed to be entitled to the same as her heir-at-law.

The questions for the opinion of the Court were :—

1. Whether the plaintiff was entitled as against the defendants to the lands and tenements comprised in the lease to Charles Miller, of the 11th of December, 1873, after the expiration of that lease, and to the other premises, the subject-matter of this action.

2. Whether the plaintiff was entitled to the rent received by the defendants in respect of the premises comprised in the lease of the 11th of December, 1873, to Charles Miller, since the date of the death of Susannah Mann.

If the Court should answer both questions in the affirmative, then judgment was to be entered for the plaintiff for a declaration of his title to the said premises and for 50*l.* for mesne profits, together with the costs of this action.

If the Court should answer both questions in the negative, then judgment was to be entered for the defendants in the action, with costs.

If the Court should answer the first question in the affirmative and the second in the negative, then judgment was to be entered for the plaintiff for a declaration of his title to the premises comprised in the lease to Charles Miller, after the expiration thereof, and to the other premises referred to, and for 20*l.* for mesne profits in respect of the premises not included in the said lease of the 11th of December, 1873, together with the costs of this action.

The Queen's Bench Division (Pollock, B., and Lopes, J.) held

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that the terms of the document executed by Robert Mann were sufficient to create a separate use in favour of Susannah Mann, and gave judgment for the defendants. The question was not argued whether the document was inoperative to bind the fee simple, it not having been signed by Susannah Mann.

The plaintiff appealed.

April 24, 26. *A. Charles*, *Q.C.*, and *L. M. Aspland*, for the plaintiff. First, it is contended that the document mentioned in paragraph four of the special case does not by its terms affect the contingent remainder in fee, which was given to the testatrix by her first husband's will. That estate did not become vested in her and did not become an interest in possession until long after her marriage with R. Mann, namely, on the death of her son. Unless that document is to be deemed equivalent to articles of settlement of the whole estate given to her, it will not bind the fee simple in remainder. The only words which can be alleged by the defendants to confer a power to dispose by will of the fee simple, are "nor yet with any property whatsoever she is in possession of at the time of her marriage to him;" but they are not wide enough to include estates in remainder, for they refer only to property in possession. It is admitted on behalf of the plaintiff that the language of the document is large enough to create a separate use in respect of the property actually vested in the testatrix at the time of her marriage to R. Mann: but at that time she had in possession only a life estate in the hereditaments sought to be recovered in this action.

Secondly, even if the words of the document mentioned in paragraph four of the special case are sufficient to bind estates in remainder, nevertheless it is inoperative as against the heir of the testatrix, it having been signed not by her, but by R. Mann alone. As she was not a party to it, and did not assent to it by signing it, it cannot operate as a settlement and cannot bind the inheritance. The defendants' counsel may rely upon *Rippon* v. *Dawding* (1), but that case appears to be doubted in *Field* v. *Moore* (2). Formerly, it was doubted whether the husband and

(1) Amb. 565.

(2) 7 D. M. & G. 691, at pp. 718, 719; 25 L. J. (Ch.) 66, at p. 72.

wife by mere agreement before, and in contemplation of marriage that she might dispose of her real estate by deed or will during the coverture, could enable her to defeat the right of her heir, after her death, by either of those instruments: 2 Bright's Husband and Wife, bk. 1, ch. xxiv., s. 3, par. 12, p. 56; and, at all events, an intended husband cannot, by agreement signed by him alone, confer upon his wife the power of disposing of her real property, for it cannot be deemed to be settled to her separate use unless she also signs the agreement. The doctrine as to separate use is wholly equitable, and a separate use arises out of, and depends upon, a trust: per Lord Thurlow, L.C., *Hulme* v. *Tenant* (1); trustees ought to be appointed in the first instance, and if none are appointed, the husband is held to be a trustee, and by virtue of the Statute of Frauds, s. 7, all trusts as to the wife's real property must be in writing and signed by her. The plaintiff does not rely upon s. 4, because R. Mann signed the memorandum; but if he had not signed it, the agreement between the husband and wife would have been invalid by reason of s. 4, and the doctrine laid down by Lord Cranworth, L.C., in *Caton* v. *Caton* (2) shews that marriage would be no part performance sufficient to defeat the operation of the statute. In order to create a separate estate a trust must be declared as to the wife's property, and that declaration can only be made by the wife herself.

W. Barber, Q.C., and *William Wills*, for the defendants, were directed to confine their argument to the question arising upon the Statute of Frauds, s. 7. When a separate use has been duly created, the wife has full power to dispose of the fee simple in her real property: *Taylor* v. *Meads* (3); *Pride* v *Bubb* (4); *Hulme* v. *Tenant* (5). It is true that no mere consent on the part of a husband will enable his wife to dispose of her real property by will; but in the present case the intended husband made a bargain to give up his marital rights, and a renunciation of

(1) 1 W. & T. (L. C. in Eq.) 521, at p. 523, 5th Ed.

(2) Law Rep. 1 Ch. 137: affirmed on a different ground, Law Rep. 2 H. L. C. 127.

(3) 4 D. J. & S. 597.

(4) Law Rep. 7 Ch. 64, at p. 69.

(5) 1 W. & T. (L. C. in Eq.) 521, at p. 530, 5th Ed.

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marital rights is sufficient to clothe his wife with a testamentary power, or to constitute a valid declaration of trust of the fee simple. It is a common practice upon an intended marriage, where there is no likelihood of children, for the husband to simply renounce his marital rights over his wife's property.

[FRY, L.J. I am not aware that the validity of a renunciation of that kind has ever been tested in a superior Court.]

There is no magic in the words "separate use;" any words will be sufficient to create a separate use which shew an intention to place the wife's property at her own disposal: *Stanton* v. *Hall* (1); the test, whether a separate use has been created, is whether the language used excludes the husband's control. A mere memorandum signed by an intended husband is sufficient to create it: *Rippon* v. *Dawding* (2); *Tyrell* v. *Hope* (3); and the intervention of trustees is unnecessary: *Hall* v. *Waterhouse* (4). No other person but the husband can take away the power of disposition, and in this case he has renounced the right of interference.

Further, the doctrine as to separate use does not depend upon trusts, and it is unnecessary that a declaration of trust in writing should be made by the wife; the Statute of Frauds, s. 7, does not apply. In the present case a trust in writing, if that be necessary, has been duly declared by the intended husband, R. Mann; if the argument for the plaintiff were correct, the intended wife previously to her marriage would have been compelled to declare a trust in her own favour: she would be at once trustee and cestui que trust: this result would be an absurdity.

Lastly, as to the second question put for the opinion of the Court, the defendants, even if they are wrong as to all the other points raised, are entitled to the rent received by them in respect of the premises comprised in the lease to Charles Miller since the death of Susannah Mann. That lease, being duly acknowledged under 3 & 4 Wm. 4, c. 74, operated as a good post-nuptial settlement, and conferred upon the wife a right independent of her husband, and therefore created a separate use: rent payable under the terms of the lease became a part of her separate estate

(1) 2 Russ. & My. 175, at p. 180.
(2) Amb. 565.
(3) 2 Atk. 558.
(4) 5 Giff. 64; 11 Jur. (N.S.) 361.

and followed the limitations of her will and became vested in the defendants, who are the trustees thereby appointed.

A. Charles, Q.C., in reply. No separate use was created, and therefore the doctrine in *Taylor* v. *Meads* (1) does not apply. The Statute of Wills of the present reign, 1 Vict. c. 26, conferred upon a married woman no greater power to make a will than she had previously possessed: *Willock* v. *Noble* (2); that was expressly enacted by s. 8, and by 34 & 35 Hen. 8, c. 5, s. 14, it had been expressly enacted that no will of a married woman should be valid. The language used in Bright's Husband and Wife, vol. ii., bk. 3, ch. i., s. 2, p. 204, shews that a separate use depends upon a trust. It is no doubt necessary to obtain the intended husband's consent to the creation of a separate use in the intended wife's real property, for the settlement creating the separate use would otherwise be liable to be set aside as a fraud upon the husband's marital rights: *Countess of Strathmore* v. *Bowes* (3); but it is the wife who creates the separate use, and her intention must be declared by a document duly executed by her.

As to the second question put to the Court, the plaintiff is right as to it, if he is right as to the first, and at all events the language of the lease is insufficient to create a separate use.

Cur. adv. vult.

May 30. The judgment of the Court (Brett, M.R., Bowen and Fry, L.JJ.) was delivered by

FRY, L.J. After stating the facts as they appeared in the first four paragraphs of the special case, the Lord Justice proceeded as follows: In this state of circumstances two questions have arisen. The first question, which is the only one which was discussed in the Court below, was whether the language of the memorandum signed by Robert Mann, assuming it to be operative, was sufficient to affect and bind the interest by way of remainder in the freehold property, which at the date of the memorandum was contingent and not in possession. We agree with the Court

(1) 4 D. J. & S. 597. (2) Law Rep. 7 H. L. 580.
(3) 1 W. & T. (L. C. in Eq.) 446, 5th Ed.

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below in holding that the language includes every interest taken by the wife in the property then in her possession, and therefore as binding the contingent remainder, when it fell into possession by the death of the son.

The second question was whether by the conjoint operation of the memorandum and will the devisees took anything or nothing. It appears to us to be plain that the heir can be deprived of the beneficial interest in the inheritance only in one or other of two ways, namely, by devise or by the conversion of the heir into a trustee. We will consider subsequently a third way insisted on by Mr. Barber.

By devise properly speaking the heir in the present case could not be disinherited, for the ancestor was at her death a married woman, and by the Statute of Wills of Henry VIII. married women are declared incapable of devising lands, and no difference has been made in this branch of the law by the statute of the Queen relative to wills. A feme coverte has, properly speaking, no testamentary capacity. Was the heir converted into a trustee for the nominees or quasi devisees of Mrs. Mann? It appears to us that the fee simple of a wife may be affected by a trust for her separate use in one of three ways: (1) by conveyance to a trustee or a declaration of trust by the wife before marriage, if made with the husband's consent; (2) by an agreement between the intended husband and wife before marriage; and (3) by an acknowledged assurance by a wife after marriage. Now, in the present case there was in our opinion an agreement in fact between the husband and wife before marriage upon the terms of the memorandum signed by Mann, and we are of opinion that that agreement would have been a sufficient declaration of trust of the fee, but for the fact that the wife never signed the memorandum, and for the provisions of the 7th section of the Statute of Frauds, which enacts that all declarations or creations of trusts of any hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect. We conclude that there is no evidence on which the Court can proceed, of the existence of an ante-nuptial agreement settling the fee to the separate use of the wife.

But then it was argued that the memorandum signed by the husband was a sufficient declaration of trust by him to create a separate use of the fee. It is, however, obvious that no man can create a trust of an estate which he does not possess, or of any larger estate than he possesses, that the husband did not possess the fee, but only an estate during the joint lives of himself and his wife with a possible estate by the curtesy, and consequently that, however valid his declaration might be as regards the interests he had, it could not bind the fee which he had not.

Furthermore, Mr. Barber urged us to hold that the mere renunciation by the husband of his marital rights was sufficient to clothe the wife with a testamentary power, or to constitute a valid declaration of trust of the fee. As to the first of these propositions, no authority was produced for it, and it appears to us to be entirely contrary to principle. The effect of marriage on a woman is or was to give certain rights to the husband over her property, and to suspend during the coverture the testamentary capacity which she previously possessed. These effects are entirely independent of one another. This incapacity to devise real estate does not arise from the husband's interest in her property, and consequently cannot be cured by his renunciation of interest. It was admitted that a feme coverte has no power with the consent of her husband to make a will of real estate; and there appears to us no distinction between consent and renunciation in this case. The suggestion, that the renunciation of the husband can create a valid declaration of the fee, has in fact been already dealt with; a husband, who has not the fee, cannot by renunciation of his rights bind the fee.

The only authority in any way in conflict with the views which we have expressed appears to be the case of *Rippon* v. *Dawding* (1), where the Lord Chancellor Camden undoubtedly treated as creating a valid trust of the fee an ante-nuptial agreement, in respect of which it is at least doubtful whether it was evidenced by any writing of the wife. But the point arising from the Statute of Frauds was not raised in the case, and the doubt expressed by Turner, L.J., in *Field* v. *Moore* (2), as to the sufficiency

(1) Amb. 565.

(2) 7 D. M. & G. 718, 719.

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of the evidence of the agreement in *Rippon* v. *Dawding* (1) probably refers to this want of a writing signed by the wife.

A third question was raised from the terms of a lease made by Mr. and Mrs. Mann to a Mr. Miller and duly acknowledged by Mrs. Mann. It was contended that the terms of this instrument were sufficient to make it operate as a valid post-nuptial settlement perfected by an acknowledged assurance of the rents payable under the lease. It appears to us, however, that the terms relating to the separate use of Mrs. Mann refer only to her life, and consequently have no operation on the rents which accrued after her death.

On the whole, therefore, we conclude that the heir was not disinherited by devise or trust, and consequently that the judgment below must be reversed, and the plaintiff must recover the lands in question with costs in the Court below. But, as the plaintiff did not argue in the Court below the point on which he has succeeded here, there will be no costs of the appeal.

Judgment for the plaintiff.

Solicitors for plaintiff: *Field, Roscoe, Field, Francis & Osbaldeston, for Gardner & Sons, Rugeley.*

Solicitors for defendants: *Burton, Yeates, Hart, & Burton, for E. M. Beloe, King's Lynn.*

(1) Amb. 565.

J. E. H.

[IN THE COURT OF APPEAL.]

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April 9.

BURDICK *v.* SEWELL AND NEPHEW.

Ship—Liability for Freight—Indorsee of Bill of Lading—"Passing of Property" in Goods shipped—Indorsement by way of Pledge—Bills of Lading Act (18 *&* 19 *Vict. c.* 111), *s.* 1.

The shipper of goods, by simply indorsing the bill of lading and delivering it to the indorsee by way of security for money advanced by him, passes the property in the goods to the indorsee, so as to make him directly liable to the shipowner for freight under 18 & 19 Vict. c. 111, s. 1.

So *held* by Brett, M.R., and Baggallay, L.J., Bowen, L.J., dissenting.

The shipper of goods indorsed the bill of lading in blank and delivered it to the defendants by way of security for money advanced by them. The goods upon their arrival at the port of destination were sold for an amount insufficient to pay the freight:—

Held (by Brett, M.R., and Baggallay, L.J., Bowen, L.J., dissenting), that the property in the goods had passed to the defendants within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), s. 1, so as to make them liable in an action by the shipowner for freight.

Judgment of Field, J. (10 Q. B. D. 363), reversed.

APPEAL by the plaintiff against the judgment of Field, J., upon further consideration, in favour of the defendants. (1)

The facts are fully stated in the report of the proceedings before Field, J., and also are stated in the judgments hereinafter set forth.

1883. Nov. 26, 27. *C. Hall, Q.C.*, and *Edwyn Jones*, for the plaintiff.

Sir F. Herschell, S.G., and *Danckwerts*, for the defendants.

The following authorities were cited in the course of the argument:—*Lickbarrow* v. *Mason* (2); *Hibbert* v. *Carter* (3); *Barber* v. *Meyerstein* (4); *Glyn* v. *East and West India Dock Co.* (5); *Short* v. *Simpson* (6); *Newsom* v. *Thornton* (7); *Turner* v. *Trustees of the Liverpool Docks* (8); *Jenkyns* v. *Brown* (9); *Harris*

(1) 10 Q. B. D. 363.
(2) 1 Sm. L. C. 756, 7th Ed.
(3) 1 T. R. 745.
(4) Law Rep. 4 H. L. 317.
(5) 6 Q. B. D. 475; 7 App. Cas. 591.
(6) Law Rep. 1 C. P. 248.
(7) 6 East, 17.
(8) 6 Ex. 543; 20 L. J. (Ex.) 393.
(9) 14 Q. B. 496; 19 L. J. (Q.B.) 286.

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v. *Birch* (1); *In re Attenborough* (2); *Johnson* v. *Stear* (3); *Donald* v. *Suckling* (4); *Franklin* v. *Neate* (5); *Kemp* v. *Falk* (6); Story on Bailments, s. 297; Blackburn on Sale, p. 297; *Pease* v. *Gloahec* (7); *The Freedom.* (8)

Cur. adv. vult.

1884. April 9. The following judgments were delivered:—

BRETT, M.R. In this case the material facts seem to be, that the goods in respect of which freight is demanded in the action were shipped on board the plaintiff's ship, the *Zoe*, by one Nercessiantz, to be carried to Poti in Russia; that Nercessiantz applied to the defendants (who were bankers in Manchester) for, and obtained from them, a loan or advance; and, as a security for the advance, indorsed to the defendants the bill of lading of the goods; that circumstances arose under which the goods were landed and warehoused in Poti with a stoppage for freight; but the goods were sold under Russian Law for duties and charges, and were sold for an amount which left nothing applicable to answer the claim for freight. Thereupon the plaintiff demanded the freight from the defendants. The case was tried before Field, J., without a jury; and he held, as a matter of law, that he was entitled to inquire whether, and he found as a fact that, the intention of Nercessiantz and the defendants was that the transaction was to be only a pledge, that is, that the intention was not to pass and take respectively the whole legal property, subject to an equity as to redeeming it, or as to a balance, if any, after a sale, but to pass and take respectively only a pledge. The learned judge then held, as the result of that intention, that the legal property in the goods did not pass to the defendants, that the Bills of Lading Act did not apply, that there was no contract between the plaintiff and defendants, and that the plaintiff could not maintain his action for freight against the defendants. Against this judgment the plaintiff appeals. The ultimate question of course is, whether under the circumstances the property in the goods

(1) 9 M. & W. 591.
(2) 11 Ex. 461.
(3) 15 C. B. (N.S.) 330.
(4) Law Rep. 1 Q. B. 585.
(5) 13 M. & W. 481.
(6) 7 App. Cas. 573.
(7) Law Rep. 1 P. C. 219, at p. 227.
(8) Law Rep. 3 P. C. 594.

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passed by the indorsement of the bill of lading to such an extent as to bring the case within the Bills of Lading Act (18 & 19 Vict. c. 111). That depends very nearly, if not quite, upon the question stated by Field, J. (1): "The question in the present case," he says, "resolves itself into, whether the security was intended to operate, or by implication of law arising upon the undisputed facts did operate, in the same way as an assignment by bill of sale or as a mere pledge?" I should rather put the question thus, "Does or does not the indorsement of a bill of lading as a security for an advance, as distinguished from an indorsement of it upon a sale of it or of the goods named in it for a price, by necessary implication operate in the same way as an assignment of goods by bill of sale, that is, so as to pass the whole legal property in the goods to the assignee, leaving to the assignor an equity in the proceeds beyond the advance secured and expenses; or may evidence be given of other accompanying facts, from which it may be inferred that the intention of the parties was, and therefore the legal result is, that there was only a pledge of the bill of lading or of the goods named in it?" That question put more tersely is, "Does the indorsement of a bill of lading as a security for an advance, by a necessary implication, which cannot be disproved, pass the legal property in the goods named in the bill of lading to the indorsee, with an equity in the indorser, the borrower, to redeem the bill of lading by payment, or to receive the balance, if any, on a sale?" First, let us consider the consequences of the opposite views; let the transaction be treated as a pawn or pledge of the bill of lading or of the goods. If of the bill of lading, then there is no common law power in the pledgee to use the bill of lading at all; there is no power to sell it before the time when according to the contract of pledge the article pledged is forfeited, and until a late statute an unauthorized sale of it before that time would have passed no right to the vendee; if of the goods, there is no valid pledge unless the delivery of the bill of lading is treated as a delivery of possession of goods to the pledgee. But a delivery of a bill of lading is not a delivery of the possession of the goods to the pledgee, though, when speaking of its effect to pass property, it has often

(1) 10 Q. B. D. pp. 367, 368.

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been said to have the same effect as a delivery of possession of the goods; it gives to the indorsee a right to possession on arrival of the ship on payment of freight. It is because it does not give to the indorsee the possession, but that the possession is in the captain of the ship, that the original vendor may under given circumstances stop in transitu the goods in which he has no longer any property, and that the captain has a lien on the goods for his freight, charges, &c. And if the indorsement of the bill of lading is only a pledge of the goods, yet where the pledgee is not otherwise a factor, the mere pledge before the time of forfeiture given by the particular contract of pledge, would not by any Factors' Act, or any other statute until a recent one, or by Common Law, have enabled the holder of the bill of lading to sell the goods, or (if he assumed to sell them) to pass any right by such sale. It follows that any merchant, banker, or other asked to advance on the security of a bill of lading must have inquired not only whether it was indorsed for value, but as to what were the terms on which the value was given and the indorsement made. And as to insurance, if the legal property does not pass, inasmuch as certainly in equity the whole interest does not pass, the indorsee for value of the bill of lading cannot insure in his own name for more than his real interest. Whereas if the indorsement for value was treated as a mortgage, the terms of the equity relating to it were settled between the parties by a contemporaneous writing, and for a breach of those terms there was always between the parties a remedy in Equity, and the free dealing with the bill of lading in the general mercantile business of the country was not hampered. He who held the bill of lading with an interest in it could realize his interest by a legal sale, could protect all interests under it by an easy insurance. The purchaser of the bill of lading could buy with safety, and therefore could give a better price. The one view tended, as pointed out by Buller, J., in *Lickbarrow* v. *Mason* (1), to inconvenience, the other to facility in mercantile business. He points this out, as it seems to me, as a reason upon which the custom of merchants, on which his judgment was founded, came to be in existence. If the general understanding of merchants had not been, in accordance with the verdict of the jury in *Lickbarrow* v. *Mason* (1), accepted in its largest sense,

(1) 1 Sm. L. C. 756, 7th Ed.

there would, one would think, have been cases in the books raising the question; but no such thing is known in any book. The only mode of accounting for this is to say that merchants have treated the indorsement of a bill of lading for value as equivalent to a bill of sale. It has been suggested that a decision in favour of the plaintiff in this case will now hamper trade, because it will make, by reason of the Bills of Lading Act, a merchant who takes a bill of lading only as a security for an advance, so as to be in reality only partly interested in the bill of lading, liable for unknown claims under it by the shipowner who granted it. As to the liability to pay freight, it can only be important in such an isolated instance as the present, because the security for the advance can rarely be available until the lien for freight is satisfied. The amount of the advance is always calculated according to the value of the goods less the freight, and so in respect of any other claim subject to a shipowner's lien. If the bill of lading, by reference to a charterparty, incorporates other and unusual liabilities, the merchant asked to advance will examine the charterparty and only advance to a more limited amount. A loaded bill of lading is of little value. A decision in favour of the defendants would retain in the suggested case of a mere pledge the difficulty which the Bills of Lading Act was passed to obviate, namely, that the pledgee will have rights in the property but no rights in the contract. If he desires by the contract to protect the goods and his interest in the goods, which is the first interest invaded by a breach of the contract of carriage, he must revert to the old inconvenience of being obliged to use the pledgor's name. Mercantile convenience seems to me to lean strongly in favour of a decision for the plaintiff in this case. The case, however, must after all depend upon authority; it must depend upon the sense in which it is now considered that the finding of the custom of merchants by the jury in *Lickbarrow* v. *Mason* (1) has been adopted by the Courts so as to be taken to be the law merchant without further proof. In order to determine this, it may be well to examine some of the cases which were decided before and which were cited in the case of *Lickbarrow* v. *Mason* (2) as well as that case and the cases after it.

(1) 6 East, 21; 1 Sm. L. C. 699, 6th Ed. (2) 1 Sm. L. C. 756, 7th Ed.

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The question is, does the bonâ fide indorsement of a bill of lading as security for an advance, as distinguished from an indorsement upon a sale for a price, pass the whole legal property in the goods named in the bill of lading to the indorsee, leaving only equities to the indorser? The third case, put by Holt, C.J., in *Evans* v. *Martlett* (1), cited in *Lickbarrow* v. *Mason* (2), is "a bill of lading to A., and the invoice only (that is the invoice alone) shews that they are upon account of B.; A. ought always to bring the action, for the property is in him, and B. has only an equity." This does not state in terms whether the bill of lading is originally made to A., or is indorsed to A. The terms are large enough to include an indorsement to A. for value, and then B.'s interest is stated to be only one in equity. The action mentioned is obviously an action of trover. In *Hibbert* v. *Carter* (3) the plaintiffs were merchants in London, agents and general consignees of one Robert Kerr, who was the owner of goods, and shipped them from Jamaica. The plaintiffs having received advice that the goods were shipped, insured them, but before they had effected the insurance Kerr had indorsed the bill of lading to one Dellprat, in Jamaica, for an arrear due on a mortgage. Buller, J., was of opinion that Kerr had no insurable interest, because the indorsement of the bill of lading had passed the whole property to Dellprat, yet Kerr had not sold the goods. The Court was of the same opinion as to the legal property, but held that nevertheless Kerr might have an insurable interest. In what respect? Obviously in respect of his equitable interests, his right to redeem, and to a surplus, if any, on a sale. In *Wright* v. *Campbell* (4) the action was in trover by the assignees in bankruptcy of one Richard Scott. Lewis Fontaine shipped the goods and took bills of lading and indorsed one copy to Richard Swanwick in Liverpool, in order that Swanwick might sell the goods for him as factor. Swanwick indorsed this copy to Scott to secure him on his becoming bail for Swanwick, and also as security for a debt due from Swanwick to Scott. Scott demanded the goods on the arrival of the ship, but was refused. The goods

(1) 1 Ld. Raym. 271; 12 Mod. 156; 3 Salk. 290.

(2) 6 East, 23.

(3) 1 T. R. 745.

(4) 4 Burr. 2046.

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were delivered to and sold by the defendants. The action was in trover by the assignees of Scott. There was no sale for a price by Swanwick to Scott. Swanwick being a factor could not pledge to Scott, but as factor he had a right to pass the property to Scott for value. The decision is that if the transaction was bonâ fide, the indorsement to Scott for value passed the property to Scott. It did so although the value given was not the price for a sale, and Lord Mansfield is reported by Buller, J., to have approved of the case in Lord Raymond, *Evans* v. *Martlett* (1), upon an interpretation of it in its widest sense. It was after these views, thus expressed, that arose the case of *Lickbarrow* v. *Mason* (2), upon the interpretation of the decision in which the present question depends. In that case the facts were that Turing & Son sold goods to Freeman on credit, and shipped them to Freeman and sent him bills of lading. Freeman indorsed the bills of lading to the plaintiffs as security for an advance, and became insolvent before the arrival of the goods. Turing stopped the goods in transitu by indorsing a copy bill of lading to the defendants to enable them to do so on his behalf. The defendants sold the goods for Turing. Action of trover by the plaintiffs against the defendants. The defendants demurred to the evidence, or, in other words, asserted that there was no evidence on which it could legally be held that the plaintiffs were entitled to succeed. It was argued for the plaintiffs that as between the consignor and the consignee the bill of lading is a mere authority by the consignor to the captain to deliver the goods to the consignee, and to the consignee to receive them, and that the consignee cannot transfer a greater right than he has, that is, a right to receive the goods if the authority given to the captain is not countermanded. It was argued for the defendants that the bonâ fide indorsement, for a valuable consideration, of a bill of lading to a third person is an absolute transfer of the whole property. It was not suggested on either side that there was a question of intention to be determined by a jury on an inference of fact. It is clear that everyone assumed that the bill of lading was indorsed in order to secure to the plaintiffs the amount of their advance, leaving the surplus, if any, for Turing. No one suggested that there was,

(1) 1 Ld. Raym. 271; 12 Mod. 156; 3 Salk. 290.
(2) 1 Sm. L. C. 756, 7th Ed.

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independently of the indorsement of the bill of lading, a contract of sale of the goods for a price as between Turing and the plaintiffs. Under these circumstances, Buller, J., says, "I make the question even more general than it was made at the bar, namely, whether a bill of lading is by law a transfer of the property:" Smith's Leading Cases, 6th Ed., vol. i., p. 710. He does not say "whether a bill of lading given under the circumstances of this case is a transfer of the property," but "whether a bill of lading is by law a transfer of the property." It is obvious that he was speaking of a bill of lading indorsed for value. He cites *Wright* v. *Campbell* (1), and then says, that "Lord Mansfield in that case said, that since the case in Lord Raymond it had always been held that the delivery of a bill of lading transferred the property at law." "If so" (says Buller, J.), "every exception to that rule arises from equitable considerations which have been adopted in Courts of law." "Thus," he says, "stand the authorities on the point of legal property; and from hence it appears that for upwards of 100 years past it has been the universal doctrine of Westminster Hall, that by a bill of lading, and by the assignment of it, the legal property does pass. And, as I conceive, there is no judgment, not even a dictum, if properly understood, which impeaches this long string of cases." It has been observed that these statements of the law are not literally correct, because they do not exclude an indorsement to a mere agent. But Buller, J., had already in the same judgment, referring to a case before Lord King, disposed of an indorsement to "a pure factor having no demand of his own." I agree, he had said, that he would have no property, because in such case the factor is only a servant or agent; "he is merely a servant or agent." But then, he said, "it remains to be proved that a man *who is in advance*, or under acceptances on account of goods, is simply and merely a servant or agent; for which no authority has been or can be produced." It is with regard to the case of "a man who is in advance on account of goods" that his whole judgment is dealing. The whole case of *Lickbarrow* v. *Mason* (2) deals with such a person. It is to me impossible to suppose, it seems to me perverse to assume, that the question finally left to the jury was not a question put and understood to be put with

(1) 1 Sm. L. C. 712, 6th Ed. (2) 1 Sm. L. C. 756, 7th Ed.

regard to such a man. The dispute was between such a man and the plaintiff. It was with regard to that dispute that the jury found "that by the custom of merchants, bills of lading for the delivery of goods to the order of the shipper or his assigns, are, after the shipment, and before the voyage performed, negotiable and transferable by the shipper's indorsement, or transmitting of the same to any other person; and that by such indorsement and delivery, or transmission, the property in such goods is transferred to such other person." If the contention made now on behalf of the defendants be true, that answer ought not to have been accepted. It made the custom too large. It ought to have contained the limitation, "if so intended." If the present contention be true, a question was not asked which ought to have been asked, namely, did the parties intend the transaction to be a pledge or a mortgage? I cannot bring my mind to believe that everybody concerned in that long discussion omitted to consider the proper limitations of the general principle which everybody was trying to discover, and which Buller, J., expressed. It was then in a case where the bill of lading was indorsed to secure an advance, that after long and exhaustive discussion and two trials, the House of Lords held, without anyone even referring to the idea that in any such case an inquiry must be made as to what was the intention of the parties, that by the general custom of merchants the bonâ fide indorsement of a bill of lading for an advance passes the legal property in the goods to the indorsee, leaving the ultimate account between the parties to be settled as an equity. Such a decision I cannot depart from. I can be no party to explaining it away. I accept it as I firmly believe it was intended. To do otherwise restores the judgment of Lord Loughborough. The judgment in *Lickbarrow* v. *Mason* (1) governs the present case. According to it the whole legal property in the goods represented by the bill of lading passed by the indorsement of the bill of lading to the defendants. If so, it cannot be doubted that by virtue of the Bills of Lading Act, the liability under the contract contained in the bill of lading passed also to and against the defendants, and that the plaintiff was and is entitled to recover the freight in dispute. I

(1) 1 Sm. L. C. 756, 7th Ed.

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cannot agree with the judgment of Field, J., and in my opinion it should be reversed.

BAGGALLAY, L.J. The plaintiff in this action is the owner of the ship *Zoe*, on which certain cases of machinery were shipped and carried to Poti, a Russian port in the Black Sea. The defendants are bankers at Manchester; and, whilst the ship was at sea, they made an advance to the shipper of the goods, who delivered over to them the bill of lading duly indorsed as a security for the loan; no memorandum of charge, or other formal document, indicative of the intention of the parties, was executed, but it was represented by the shipper to the defendants that he was about to proceed to Poti to superintend the delivery of the machinery, that the amount advanced would be repaid before he left England, and that he would call again and make definite arrangements for that purpose. He failed, however, to carry out the representations so made by him. The ship arrived at Poti in due course; and the goods, not having been cleared within the time limited for that purpose, were sold in accordance with Russian law, but did not realize more than was required to satisfy the demands of the Russian Custom House. The plaintiff thereupon, treating the property in the goods as having passed to the defendants by virtue of the delivery to them of the indorsed bill of lading, and relying upon the provisions of the Bills of Lading Act, demanded from the defendants payment of the freight and incidental charges, and, upon the refusal of the defendants to make such payments, commenced the present action. The action was tried before Field, J., without a jury, and that learned judge held that no sufficient property in the goods passed to the defendants, by the delivery to them of the indorsed bill of lading, to render them liable to the plaintiff, and he gave judgment for the defendants. From that judgment the present appeal has been brought. The first question for consideration is, what was the effect of the delivery to the defendants of the indorsed bill of lading? With all respect for the contrary opinion expressed by Field, J., and which is, I believe, concurred in by my colleague, Bowen, L.J., I am of opinion that, for reasons which I will very concisely state, the legal property in the goods

passed to the defendants by the delivery to them of the indorsed bill of lading. I do not propose to examine or discuss the numerous authorities which have been cited in the course of the arguments upon this appeal. The more important of them have been amply examined by the Master of the Rolls in the judgment which he has just delivered, and had previously been fully examined by him in the case of *Glyn* v. *East and West India Dock Company*. (1) I shall content myself with referring to that portion of his judgment in the case just mentioned which had reference to the effect of the delivery of an indorsed bill of lading. In that judgment the Master of the Rolls distinguished between the legal effect of the transaction in transferring *the legal property* in the goods, and *the equitable rights* that might be reserved to the borrower by express agreement between the parties, or might be implied in his favour from the general circumstances of the case; and after referring to a suggestion that had been made in argument that the indorsement of the bill of lading, when accompanied by such a letter of charge as had been given in that case, might not have the same fullness of effect in passing the property as if there were no letter of charge, he proceeded as follows:— "I am of opinion that an indorsement of a bill of lading for an advance does, by the mercantile law of England, pass absolutely the legal property in the goods to the indorsee, and a consequent right in law of immediate actual possession against all the world, except someone who may have an independent superior legal right of temporary possession. The right of the borrower of an advance on an indorsement of a bill of lading is, in my opinion, an equity which exists only between him and the lender. I think the indorsement of a bill of lading for an advance has, by the law merchant, the same effect as a bill of sale has by the common law to pass the legal property in goods, and in either case an equity may be reserved which is still an equity though recognised by the common law courts." (2) This is, in my opinion, a clear and correct exposition of the true effect of the delivery of an indorsed bill of lading as a security for a loan; the legal property in the goods named in the bill of lading passes to the vendor, but subject to the equitable rights of the borrower, the nature and

(1) 6 Q. B. D. 475. (2) 6 Q. B. D. 481.

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extent of which must be gathered from the circumstances of the transaction. It may be, and probably is the case, that certain equitable rights and liabilities were created between the borrower and vendor in the present case by the representations made by the former at the time of the loan, and other circumstances of the transaction, but the existence of such equitable rights and liabilities cannot, in my opinion, affect the legal effect of the delivery of the indorsed bill of lading. If it be the true effect of the delivery of the indorsed bill of lading to the defendants that the legal property in the goods passed to them, it can hardly be disputed that they became liable under the provisions of the Bills of Lading Act to pay the amount of freight claimed from them in the present action.

BOWEN, L.J. I regret very much to find myself at variance with the other members of the Court. In this case there are two questions: the first, whether any and what property in the cargo passed to the defendants upon the indorsement and delivery of the bill of lading; the second, whether the passing of any such property as passed was a passing of "the" property within the meaning of the Bills of Lading Act, 18 & 19 Vict. c. 111, so as to render the defendants liable to freight at the suit of the shipowner.

What property, if any, in a cargo afloat passes upon delivery of an indorsed bill of lading, appears to me to be a question of fact in each case that depends, so far as the rights between themselves of the immediate parties are concerned, on the express or implied agreement between them. The owner of merchandise may do whatever he pleases with his goods, he may sell them, or mortgage them, or pledge them. It is a pure question of bargain whether he delivers them upon terms which part with the entire beneficial interest in them, or which part with the entire legal interest reserving an equitable right to himself, or which part with a special property only in them, reserving to himself the general and absolute property at law. The freedom of disposition, which owners of property possess when their property is on shore, belongs to them equally when it is afloat. They can if they please sell the bill of lading, or transfer it upon terms

which amount either to a mortgage or to a pledge. For a bill of lading is a symbol of the goods themselves. The cargo being at sea, no actual delivery of it is possible before the ship arrives. During this period of flotation and transit the bill of lading becomes and remains the token or symbol of the goods, and the delivery and indorsement of the bill of lading is equivalent, so far as the passing of property is concerned, to a symbolical delivery of the goods. Upon principle and reason, therefore, apart from authority, one would suppose that it is to the agreement between the original parties that we ought to look if we wish to discover the effect as between themselves of a delivery of the indorsed bill of lading, just as it is to the agreement between them that we should look to determine the legal consequences that follow on the corporate delivery of the goods. We should expect in some cases to find that the entire property had passed; in others that there had been some different arrangement. Nobody denies that in many instances the transfer of the indorsed bill of lading passes the complete property, nor, indeed, that it is primâ facie evidence of its passing: see *Dracachi* v. *Anglo-Egyptian Navigation Co.* (1) But this does not prove that when the bargain is different the same effect follows, any more than because the property in a watch often passes on delivery, it follows that a watch cannot be pledged or mortgaged. It has been argued before us that there is an implication of law derived from the custom of merchants, that by indorsement and transfer of a bill of lading for an advance the absolute property in the cargo vests in the indorsee. In support of this contention reference has been made to the language of the present Master of the Rolls in the case of *Glyn, Mills, & Co.* v. *East and West India Dock Co.* (2) The language of Lord Bramwell in the same case is, on the other hand, in favour of a different view. Lord Blackburn, in the House of Lords, abstained from expressing an opinion as to which was the true nature of the transaction in that particular instance, but even if the transaction in *Glyn, Mills, & Co.'s Case* (2) had been held to amount to a mortgage, it would not follow that a different transaction did not amount to a pledge only, and the decision would not, as it seems to me, have militated against the principles I have above explained. It was

(1) Law Rep. 3 C. P. 190. (2) 6 Q. B. D. 475; 7 App. Cas. 591.

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further contended by the appellant that the well-known judgment of Buller, J., in the House of Lords, in the case of *Lickbarrow* v. *Mason* (1), lays it down as law that by the indorsement and delivery of a bill of lading the complete property of goods at sea passes, and that on the second trial of the case a Guildhall jury found that there was a custom of merchants to that effect. Both judgment and verdict must, as it seems to me, be read with reference to the facts of the case itself. Freeman, the consignee of the cargo, had sent to the plaintiffs two bills of lading, together with the invoice of the goods, in order that the goods might be taken possession of and sold by them on Freeman's account, and the plaintiffs had accepted and paid bills of exchange to the value of 520*l.* drawn upon them by Freeman against the goods. "The *truth of the case*," says Buller, J., "was that Freeman transferred the legal property of the goods to the plaintiffs, who were to sell them to pay themselves the 520*l.* advanced in bills out of the produce, and to be accountable to Freeman for the remainder, if any." (2) It was with reference to this transaction, a transaction of which the very essence was that the property in the goods was intended to pass, if the indorsement of the bill of lading can properly be given this effect, that Buller, J., discusses the question whether the property of goods at sea passes by the indorsement of the bill of lading. What is the proposition of law that he lays down as clear? "That every authority which can be adduced from the earliest period of time down to the present hour, agree that at law the property does pass *as absolutely* and as effectually *as if the goods had been actually delivered* into the hands of the consignee." (2) In other words, property passes by delivery of an indorsed bill of lading when it would pass by the delivery of the goods themselves. And it was with reference to the same transaction that the special verdict was found as to the custom. The question of the effect of an agreement between the parties when no property or only a qualified property was intended to pass with the bill of lading did not arise, nor was it submitted to the jury. Can it be inferred from a verdict so found that the jury intended to establish a custom by which on delivery and on indorsement of a bill of lading as between the immediate parties, and apart from the

(1) 1 Sm. L. C. 756, 7th Ed. (2) 1 Sm. L. C. 794, 7th Ed.

rights of third persons, the property in one man's goods passes to another against the will of both, unless there be some written instrument to control the effect of indorsement? If the borrower in the present instance had verbally agreed with the bank that the absolute property in the goods was *not* to pass, but a qualified property only, can it be said that any custom of merchants over-rides such oral agreement? And if this is not the law, it necessarily would seem to follow that such a restrictive agreement can be implied from the nature of the transaction itself as well as from express words. Read in their widest sense, the words of the special verdict in *Lickbarrow* v. *Mason* (1) admittedly overstate the law, for the delivery to a servant or agent of a bill of lading with the intention that he shall receive the cargo and hold it for his principal obviously passes no property. Some qualification must be read into the terms of the special verdict, and the proper qualification seems to me to be what I have said. It is not easy to see upon what principle there can be any magical virtue in the symbolical delivery (through the indorsed bill of lading) of goods afloat beyond what there would be in the delivery of goods ashore, when the question arises between the immediate parties to the agreement. Shortly after the special verdict on the second trial of *Lickbarrow* v. *Mason* (1) its meaning was considered and discussed in the Exchequer Chamber in the case of *Haille* v. *Smith.* (2) Eyre, C.J., in delivering the judgment of the Court intimates that the indorsement of a bill of lading does not itself change the property as a bargain and sale would, but is evidence only of a change, and as between the original parties derives its sole virtue and efficacy from the agreement between the parties. This is substantially the same law as that expressed by Buller, J., in *Hibbert* v. *Carter* (3), and it is not immaterial, as Field, J., has pointed out, to notice that *Hibbert* v. *Carter* (3) is a case cited with approval by Buller, J., himself, in his subsequent judgment in *Lickbarrow* v. *Mason.* (1) The mere fact that in many cases before and after *Lickbarrow* v. *Mason* (1) the transfer of a bill of lading is spoken of as passing the property, that in others it is spoken of as creating a pledge, as in *Meyerstein* v. *Barber* (4),

(1) 1 Sm. L. C. 756, 7th Ed.
(2) 1 B. & P. 561.
(3) 1 T. R. 745.
(4) Law Rep. 2 C. P. 661.

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and that in others it is spoken of as a mortgage, affords to my mind therefore no difficulty. A man may sell, or he may mortgage, or he may pledge a bill of lading by indorsing and delivering it. The question in each case, when the original parties only are concerned, is what was the bargain on the subject. In the present instance accordingly we have to draw the inference as to the effect of indorsement and delivery from the narrative of the particular transaction. The cargo shipped in England was to be delivered at Poti in the Black Sea. The owner borrowed an advance from the defendants, and as a security deposited the bill of lading, saying that he was shortly going out to Poti to superintend the receipt and delivery of the cargo and that the amount advanced would be repaid before he left England, and that he would call again to make definite arrangements about it. What have we here except the simplest form of pledge, the deposit of goods as a security for a debt, by which the right to the property vests in the pledgee so far as is necessary to secure the debt, the general property remaining in the pledgor? Delivery of possession is no doubt an essential element in any pledge, but it is very old law that constructive or symbolical delivery of possession is sufficient when actual possession cannot be given. "Goods at sea," says Story on Bailments, s. 297, "may be passed in pledge by a transfer of the muniments of title, as by a transfer of a bill of lading, or by a written assignment thereof. So goods in a warehouse may be pledged by symbolical delivery of the key, and a bill of lading is only a key of the floating warehouse where the goods are lying." The counsel for the appellant argued that if a pledge only was intended, no indorsement of the bill of lading was needed. This surely is a misapprehension. The pledgee of goods is entitled to sell them upon default, and without the indorsement of the bill of lading the common law powers of the pledgee would be incomplete. It seems to me that the language of Lord Bramwell in *Glyn, Mills, & Co.* (1) cited at length by Field, J., in the Court below applies mutatis mutandis to this case. I feel great diffidence in dissenting from the view of so considerable an authority on the mercantile law as that of the present Master of the Rolls and Baggallay, L.J., but except for their contrary opinion I should have myself thought

(1) 6 Q. B. D. 475; 7 App. Cas. 591.

that there had been in the present case, as between the original parties, a pledge and nothing more. It remains to be considered whether the pledge of an indorsed bill of lading is such a passing of "the property" as is contemplated by the Bills of Lading Act, 18 & 19 Vict. c. 111. I may pause for a moment to observe that it was clearly the opinion of those who framed that statute that the property in goods *need* not pass by the indorsement of the bill of lading, and that the framing of the preamble and section of that Act shews that the language of the special verdict in *Lickbarrow* v. *Mason* (1) is not to be read without some qualification. But, passing from this, I think that the wording of the Act shews that the provision which we have to construe does not apply to the case of a pledge (see *Fox* v. *Mott* (2), per Martin, B., as explained in *The Freedom* (3)). "A" property passes no doubt by a pledge but not "the" property which still remains in the pledgor. Was it intended that a banker who only acquired such a limited and special legal interest in a bill of lading as was necessary to secure his advance, should be sued for freight? The present is the first case, so far as I know, in which it has ever been suggested that he could. And I cannot help thinking that the many bills of lading pledged daily in the city of London for advances are not taken by bankers under any such idea. I believe that the true view of the law as to this matter, also, is that expressed by Lord Bramwell in the case of *Glyn, Mills, & Co.* (4), viz., that a mere pledgee cannot be sued for freight under the Act. He has not got "*the*" property, he has "*a*" property only. For these reasons I agree with the judgment of Field, J., whose careful and elaborate reasonings leave nothing really to be added, and to which I should have added nothing, had it not been that I am unfortunately dissentient from the opinion of the Master of the Rolls and Baggallay, L.J. In my opinion this appeal should be dismissed with costs.

Appeal allowed.

Solicitors for plaintiff: *Lowless & Co.*

Solicitors for defendants: *Hare & Co.*

(1) 1 Sm. L. C. 756, 7th Ed.
(2) 30 L. J. (Ex.) 259.
(3) Law Rep. 3 P. C. 599.
(4) 6 Q. B. D. 475; 7 App. Cas. 591.

J. E. H.

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May 27.

THE LONDON SCHOOL BOARD, APPELLANTS; DUGGAN, RESPONDENT.

Elementary Education—Education Acts, 1870 (33 & 34 *Vict. c.* 75), *s.* 74, *and* 1876 (39 & 40 *Vict. c.* 79)—*By-Laws—Non-Attendance at School—Reasonable Excuse—Employment of Child.*

A school board made a by-law under s. 74 of the Elementary Education Act, 1870, providing that "the parent of every child of not less than five nor more than thirteen years of age shall cause such child to attend school, unless there be a reasonable excuse for non-attendance," and that "any of the following reasons shall be a reasonable excuse, namely, that the child is under efficient instruction in some other manner; that the child has been prevented from attending school by sickness or any unavoidable cause; that there is no public elementary school open, which the child could attend, within two miles from the residence of such child." Where it was shewn that non-attendance was caused by the child, a girl aged twelve, with fair elementary instruction, having been in respectable employment, earning wages, which she gave to her parents, who were poor, industrious, and respectable people, and applied them to the support of their other children, whom otherwise, from no fault of the parents, they would have been unable sufficiently to support:—

Held, that these facts constituted a "reasonable excuse" for non-attendance.

CASE stated, under 20 & 21 Vict. c. 43, by one of the magistrates of the Metropolitan Police Courts.

The respondent was summoned before the magistrate upon the information of an officer of the appellants, the London School Board, for unlawfully neglecting and omitting to cause his child to attend school on various days specified in the summons, there being no reasonable excuse for such non-attendance, contrary to a by-law made by the appellants under the Elementary Education Act, 1870 (1).

The by-law provided that the parent of every child of not less than five nor more than thirteen years of age should cause such child to attend school unless there should be a reasonable excuse for non-attendance; and that any of the following reasons should be a reasonable excuse:—[The excuses set out in the by-law were those specified in s. 74 of the Elementary Education Act, 1870

(1) By 33 & 34 Vict. c. 75, s. 74: "Every school board may from time to time, with the approval of the Education Department, make by-laws for all or any of the following purposes:

"(1.) Requiring the parents of children of such age, not less than five

—the distance specified in the by-law with respect to the third excuse being two miles.]

The respondent's child, at the time of the hearing of the summons, was twelve years and seven months old. She was working in the second standard, but could read fluently, write well, and had been fairly instructed in arithmetic and grammar. As an excuse for the child's absence from school on the dates specified in the summons, the following facts were stated by her mother, who attended before the magistrate on the hearing of the summons:—The child, who was the eldest of the respondent's family, consisting of several children, had been employed as nurserymaid in a respectable family, and had earned 3*s.* a week (which she gave to her mother) and her food. The father was a labourer, at very small wages, and if the parents had been deprived of the additional money earned by the child in question it would have been impossible for them to have provided adequate food for their other children, and the health of some of the children would probably have been seriously injured. During the period the child was absent from school it was impossible for the parents to have earned more money than they did, and they had not spent money in drink or in other unnecessary ways. The appellants' officer confirmed the mother's statement, and stated that the child's parents were sober, hardworking, respectable people, influenced only by a desire for the benefit of all the children.

The magistrate found as a fact that there was a reasonable excuse for the child's non-attendance at school. He was of opinion that, as by 31 & 32 Vict. c. 122, s. 37, it is made an offence

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years nor more than thirteen years, as may be fixed by the by-laws, to cause such children (unless there is some reasonable excuse) to attend school.

"Any of the following reasons shall be a reasonable excuse; namely,

"(1.) That the child is under efficient instruction in some other manner:

"(2.) That the child has been prevented from attending school by sickness, or any unavoidable cause:

"(3.) That there is no public elementary school open which the child can attend within such distance, not exceeding three miles, measured according to the nearest road from the residence of such child, as the by-laws may prescribe."

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for a parent not to provide adequate food for his children, the parent's conduct in sending the child to work was lawful and right; and, taking into consideration the decision in *Belper School Attendance Committee* v. *Bailey* (1), that there might be other reasonable excuses than those mentioned in the by-laws, he dismissed the summons.

The question for the opinion of the Court was whether the magistrate was justified in so dismissing the summons.

G. M. Freeman, for the appellants. It is admitted that there may be other reasonable excuses besides the three specified in the by-law: *Belper School Attendance Committee* v. *Bailey* (1); but the other excuses must be 'ejusdem generis' with the specified ones. There is nothing shewn here to prevent the child's attendance; the only excuse is that the parents required her earnings. It cannot be a reasonable excuse that the child is engaged in an employment, which by s. 5 of the Elementary Education Act, 1876, is prohibited with respect to the employer. That section (which prohibits persons from taking into their employment children upwards of ten years old who have not obtained certificates of proficiency or attendance at school) is inconsistent with the view that the parents' necessity with respect to the child's earnings affords any excuse for non-attendance.

The respondent, in person, was not heard.

STEPHEN, J. I am of opinion that the decision of the magistrate was right. I think the respondent has shewn a reasonable excuse within the meaning of the Act and the by-law for the non-attendance of his child at school. It appears from the statements in the case that the child has been earning money which must have formed a necessary and considerable part of the maintenance of the family. She has been discharging the honourable duty of helping her parents, and, for my own part, before I held that these facts did not afford a reasonable excuse for her non-attendance at school, I should require to see the very plainest words to the contrary in the Act. I may add that there is nothing I should read with greater reluctance in any

(1) 9 Q. B. D. 259.

Act of Parliament than that a child was bound to postpone the direst necessity of her family to the advantage of getting a little more elementary instruction for herself. In expressing these views I do not desire to say a word against the course pursued by the School Board. I think the magistrate's decision was just and right, and should be affirmed.

MATHEW, J. I am of the same opinion. I fail to see anything unreasonable in the conclusion at which the magistrate arrived.

Judgment for the respondent.

Solicitors for appellants: *Gedge, Kirby, & Millett.*

W. A.

HEAWOOD, APPELLANT; BONE AND ANOTHER, RESPONDENTS. *May* 27.

Lodgers' Goods Protection Act, 1871 (34 & 35 *Vict. c.* 79), *ss.* 1, 2—"*Lodger*," *who is—Sleeping and Residence on Premises—Occupation for Business Purposes.*

The appellant occupied the first floor and basement of premises at a yearly rent, carrying on the business of a publisher there, but sleeping and residing elsewhere. He had no key of the outer door, which was under the control of his immediate landlord, who admitted him every morning:—

Held, that the appellant was not a "lodger" within the meaning of s. 1 of the Lodgers' Goods Protection Act, 1871.

CASE stated, under 20 & 21 Vict. c. 43, by Sir Robert Carden, one of the aldermen and justices of the peace of the City of London.

The appellant took out a summons to obtain an order, under the Lodgers' Goods Protection Act, 1871 (1), for the return of

(1) 34 & 35 Vict. c. 79, s. 1:—"If any superior landlord shall levy, or authorize to be levied, a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained, or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and

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certain goods alleged to have been illegally distrained by the respondents upon premises occupied by the appellant.

The respondents were the superior landlords of premises 77, Fleet Street, and one S. Botibol, the immediate landlord of the appellant, was their tenant of the same premises.

The appellant, on and before the 26th of March, 1884, was in occupation of the first floor and basement of the premises, under an agreement in writing with his immediate landlord, at a yearly rent of 75*l.* to be paid quarterly in advance. The appellant lived at Peckham, and did not sleep at 77, Fleet Street, but carried on business as a publisher there. He had no key of the outer door. The immediate landlord had the possession and control of that door, and used to wait for the appellant every morning and open the door for him.

On the 26th of March, 1884, the superior landlords levied a distress on the furniture, goods, and chattels of the appellant for 75*l.* rent due to them by S. Botibol. On the 29th of March the

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also setting forth whether any, and what rent is due and for what period, from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord; and to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels, referred to in the declaration."

Sect. 2. "If any superior landlord, or any bailiff or other person employed by him, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person, shall be deemed guilty of an illegal distress; and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate; and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods, or otherwise, as to him or them may seem just; and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into."

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appellant served upon the respondents a declaration, accompanied by an inventory of the goods distrained, as required by the Lodgers' Goods Protection Act, 1871.

In that declaration the appellant stated that the sum of 18*l.* 15*s.* was then "due from me to S. Botibol, my immediate landlord, in respect of my occupation of lodgings in the said premises."

The appellant tendered 18*l.* 15*s.* to the respondents. It was admitted that the appellant had duly complied with all the formalities required by the Act so far as to entitle him to make the application for a return of the goods, and that the superior landlords had nevertheless proceeded with the distress.

It was contended for the respondents that, as the appellant did not reside or sleep on the premises, but occupied them for the purposes of business, he was not a lodger within the meaning of the Act.

It was contended for the appellant that he was a lodger within the meaning of the Act, and that it was not necessary for him to sleep on the premises in order to claim the protection of the Act, as his immediate landlord had control over the outer door.

The alderman held that the appellant was not a lodger within the meaning of the Act, and dismissed the application.

The question for the opinion of the Court was whether the appellant was a lodger within the meaning of the Lodgers' Goods Protection Act, 1871.

Lionel Hart, for the appellant. It is not necessary that a person should sleep or reside on premises in order to make him a lodger within s. 1 of the Lodgers' Goods Protection Act. The object of the legislature was to deal with the question as between the lodger and the superior landlord. Where the immediate landlord retains such control and dominion over the house as are usually retained by masters of houses let in lodgings, it is sufficient to cause the Act to operate. If there is a personal relationship existing between the immediate landlord and the person who occupies part of the house, that person is a "lodger" within the meaning of the Act, though he be entitled to the exclusive possession of the rooms occupied by him, and has uncontrolled right

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of ingress and egress: *Ness* v. *Stephenson* (1), *Morton* v. *Palmer*. (2) The word "chattels" in s. 1, shews that it was contemplated that something more than the ordinary furniture and goods of a lodger might be on the premises, and shews therefore that the word "lodger" was not used in its popular sense. There is no good reason why the benefits of the Act should not be extended to an occupation of premises for business purposes. The hardship to the occupier is the same as if he slept there. Here the appellant's immediate landlord retained complete control over the premises. When the agreement between the person occupying a part of the house and his immediate landlord might amount to the creation of an under-tenancy it was nevertheless held that the person might be a lodger for the purposes of the Act: *Phillips* v. *Henson*. (3) The registration cases defining a lodger with respect to the lodger franchise do not directly apply, though the same test, namely, reservation of control by the owner, is applied in some of those cases: *Thompson* v. *Ward* (4); *Bradley* v. *Baylis*. (5)

J. V. Austin, for the respondents. The cases cited for the plaintiff do not apply. Those decided on the Act in question are with reference to the distinction between undertenants and lodgers. The registration cases have no application, because residence is necessary to confer the lodger franchise under s. 4, sub-s. 2, of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102). There is no definition of "lodger" in the Lodgers' Goods Protection Act, and the ordinary and popular meaning of the word should be adopted in construing it. In ordinary language, by "lodger" is meant a person living in the house, and to constitute living it is necessary that he should sleep there. It would be an abuse of language to call the appellant a lodger, under the circumstances stated in the case. The definition of "lodger" in standard dictionaries, is, "one who lives," &c., and the expressions of the judges in *Barnes* v. *Peters* (6); *Morton* v. *Palmer* (7), and *Phillips* v. *Henson* (3), shew that there must be

(1) 9 Q. B. D. 245.
(2) 51 L. J. (Q.B.) 7.
(3) 3 C. P. D. 26.
(4) Law Rep. 6 C. P. 327.
(5) 8 Q. B. D. 195.
(6) Law Rep. 4 C. P. 539.
(7) 51 L. J. (Q.B.) 7.

"living" in a house in order to constitute a lodger. The question is one of fact: *Ness* v. *Stephenson*. (1) The words "goods and chattels," were introduced into the Act in order to cover the cases both of furnished and unfurnished lodgings.

Lionel Hart, replied.

STEPHEN, J. The question raised in this case is one of some difficulty. It lies in a small compass, but it is one of those questions which may be decided with equal ease either in one way or the other. I do not think that the decisions in the registration cases cited have any bearing upon the question —for the reason which was given in argument that in all those cases residence was necessary in order to confer the franchise. Nor do I think the other cases cited, which were decisions upon this Act, affect the question we have to decide in any appreciable degree, because the Courts had not to consider this question, but had to draw a line between under-tenants and lodgers. We have, therefore, I think, to determine this case upon its merits without assistance from authority, and to say what upon the whole we think the statute meant by the term "lodger." I come to the conclusion that it meant a "lodger" in the popular sense of the word, that is, one who sleeps upon the premises. In the ordinary use of language a person of average education would not call the appellant a "lodger," because lodging in the common acceptation means living and residing at a place; and if you went further and asked what was meant by living and residence, in general the answer would be that the person fulfilled the description if he slept there, that is, if he undressed and went to bed, staying there until he rose the next morning in the usual way. If it is asked why the Act should have meant this rather than anything else, the answer is that the object was to prevent poor persons from having their homes broken up by distresses for rent by the superior landlord. That view of the meaning of "lodger" seems to me a fair one. It would be a strong thing to hold that all persons who occupy rooms for business purposes in the daytime are lodgers within the meaning of the Act. I am of opinion that our judgment should be for the respondents.

(1) 9 Q. B. D. 245.

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MATHEW, J. I am of the same opinion. The popular meaning of the word "lodger" is a person who lives and sleeps in the place. Were the argument for the appellant adopted, it is difficult to see how the definition could stop short of including barristers, stockbrokers, accountants, shopkeepers, and all persons who occupied rooms for business purposes. I think it would be an inaccurate use of language to call them lodgers.

Judgment for the respondents.

Solicitor for appellant: *H. J. Philpotts.*
Solicitors for respondents: *A. S. Edmunds & Son.*

W. A.

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Dec. 12.

[IN THE COURT OF APPEAL.]

THE CORPORATION OF PORTSMOUTH *v.* SMITH AND OTHERS.

Local Government Acts—Road made good, and afterwards repaired—"Street"—Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *s.* 53.

In 1857 a local Act was passed incorporating certain parts of the Towns Improvement Clauses Act, 1847, including s. 53. At that time a country road ran past the land of the defendants. In 1874 the plaintiffs bought certain land of the defendants, and by agreement the road was widened and improved at the expense of the plaintiffs. In 1880 the plaintiffs paved and flagged the footway by the side of the road, and sought to recover the expense of the work from the defendants as adjoining owners under the powers of the enactment above mentioned:—

Held, that the defendants were not liable for the expense of paving and flagging the footway.

Per Brett, M.R., and Bowen, L.J., on the ground that the work executed in 1880 was in the nature of repairs to the road.

Per Baggallay, L.J., on the ground that the road had been "theretofore" made good.

Maude v. *Baildon Local Board* (10 Q. B. D. 394) questioned.

THE plaintiffs were the urban sanitary authority of the borough of Portsmouth, and the defendants were the owners of certain land abutting on the north side of a roadway called the Asylum Road, within the urban sanitary district of Portsmouth.

By the Landport and Southsea Improvement Act, 1857 (20 & 21

Vict. c. xxxvii.), s. 4, the limits of the Act were to comprehend certain parts of the parishes of Portsea and Portsmouth, and s. 16 incorporated the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34) (1), with certain exceptions immaterial

(1) By the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 3, "The word 'street' shall extend to and include any road, square, court, alley, and thoroughfare within the limits of the special Act."

Sect. 53. "If any street, although a public highway at the passing of the special Act, have not theretofore been well and sufficiently paved and flagged, or otherwise made good, the commissioners may cause such street or the parts thereof not so paved and flagged or otherwise made good, to be paved and flagged or otherwise made good, in such manner as they think fit, and the expenses incurred by the commissioners in respect thereof shall be repaid to them by the occupiers of the land abutting on such street, or such parts thereof as have not been theretofore well and sufficiently paved and flagged or otherwise made good, and such expenses shall be recoverable from such occupiers respectively as hereinafter provided with respect to private improvement expenses, and thereafter such street shall be repaired by the commissioners out of the rates levied under this or the special Act."

Sect. 54. "If any street, not being a public highway at the passing of the special Act, be then or thereafter paved, flagged, or otherwise made good, to the satisfaction of the commissioners, then, on the application of the greater part in value of the occupiers of the houses and lands in such street, the commissioners shall, by writing, under their common seal if they be incorporated, or, if they be not incorporated then under the hands of five of the commissioners, declare the same to be a public highway, and thereupon the said street shall become a public highway, and shall be thereafter repaired by the commissioners out of rates levied under this and the special Act; and such declaration shall be entered among the proceedings of the commissioners, and notice of such declaration shall be put up in some conspicuous place in or near such street."

Sect. 55. "If any street, not being a public highway at the passing of the special Act, be thereafter to the extent of two-third parts thereof paved and flagged or otherwise made good to the satisfaction of the commissioners, then, on the application of the owners of the lands abutting on such parts of the said street as have been so made good, the commissioners may require the owners of the buildings or lands abutting on the remainder of the said street to pave and flag or otherwise make good to the satisfaction of such commissioners such remainder of the said street or such parts thereof as front such last-mentioned buildings and lands, within a reasonable time to be fixed by the commissioners; and if such remainder of the said street, or any such part thereof as aforesaid, be not made good as aforesaid within the time so fixed, the commissioners may cause the part not so made good to be made good, and the expenses which shall be incurred by the commissioners in respect thereof shall be repaid to them by the owners by

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to the present case. And by s. 20, in construing s. 53 of that statute, the word "owners" was to be substituted for "occupiers." By the Local Government Supplemental Act, 1864 (No. 2) (27 & 28 Vict. c. 83), s. 1, "the provisional orders contained in the schedule hereunto annexed shall, from and after the passing of this Act, be absolute, and be as binding and of the like force and effect as if the provisions of the same had been expressly enacted in this Act." One of the provisional orders contained in the schedule to the Act related to Portsmouth, and thereby, after reciting that the mayor, aldermen, and burgesses of the borough of Portsmouth, by the council of the borough, acting as the local board for the borough, being a district within which the Local Government Act, 1858, had been duly adopted, had, in pursuance of the Local Government Act, 1858, presented a petition to one of her Majesty's principal Secretaries of State, praying for the alteration and partial repeal of certain local Acts of Parliament in force within the said district, having relation to the purposes of the said Local Government Act, and not conferring powers or privileges upon any corporation, company, undertakers, or individuals for their own pecuniary benefit (one of these Acts being 20 & 21 Vict. c. xxxvii.), Sir G. Grey, as one of her Majesty's principal Secretaries of State, directed that after the passing of any Act of Parliament confirming the provisional order, the recited local Acts, except the parts thereof specified in the

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whom such paving ought to have been done respectively; and such expenses, if not forthwith repaid by such owners, shall be recoverable from the occupiers of such buildings and lands as hereinafter provided with respect to private improvement expenses; and when the whole of the street is paved and made good to the satisfaction of the commissioners, they shall, by writing, under their common seal if they be incorporated, or, if they be not incorporated, then under the hands of five of the commissioners, declare the same to be a public highway, and thereupon the said street shall become a public highway, and shall for ever afterwards be repaired by the commissioners, and such declaration shall be entered among the proceedings of the commissioners."

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, "'Street' includes any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley or passage whether a thoroughfare or not."

schedule thereunto annexed, should be repealed; and Sir G. Grey further directed, amongst other things, that the provisions of the recited local Acts not thereby repealed, and of the Acts incorporated in whole or in part with the recited local Acts, should be incorporated with the Local Government Act, and the local board should be the commissioners for executing the said Acts. The schedule to the provisional order retained the 16th section of 20 & 21 Vict. c. xxxvii., in so far as it incorporated the following sections (amongst others) of the Towns Improvement Clauses Act, 1847, namely, s. 53, and the section numbered 20, in so far as it related to the interpretation of the 53rd section. By articles of agreement dated the 12th day of September, 1874, and made between the defendants (thereinafter called the vendors) of the one part and the plaintiffs (thereinafter called the corporation) of the other part, the vendors agreed to sell, and the corporation to purchase, for the sum of 14,000*l.*, certain parcels of land containing 75 acres, situate in the parish of Portsea, bounded "by a public road on the south," and the vendors agreed to "set back the land on the north and south sides of the said road, so that the same may become and be made of a uniform width of forty feet between" certain points, "and the expenses of widening and making up the said road shall be borne by the corporation." It was proposed to build a lunatic asylum on the land so bought. The road above-mentioned had formerly been a public highway, but it had not been paved or metalled before 1875. In that year the corporation widened and made up the road, and put a kerb along the edge of the footpath at the side, but did not then pave or flag the footpath: they, however, remade the surface of the road, both footway and carriageway. The road was then named Asylum Road. The traffic to the asylum rendered it necessary to pave the footpath; and accordingly, in 1880 the plaintiffs, acting as urban sanitary authority, paved and flagged the footpath, and they now sought to recover the expenses of so doing from the defendants as adjoining owners.

The action came on for trial before Lindley, L.J., and a jury, and the learned Lord Justice left two questions to the jury: (1.) Was Asylum Road, in the popular acceptation of the term, a street? This question was answered in the negative. (2.) Was

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the road paved or otherwise made good before 1879? To this the jury answered that it had been made good before 1879. The learned Lord Justice reserved the action for further consideration, and ultimately delivered the following judgment:—

LINDLEY, L.J. This case is curious, and certainly not free from difficulty. As I understand, the facts are shortly these: the local Act was passed in the year 1857, the provisional order was made in 1864, and after that Act came into operation, in the year 1874, this agreement was made between the corporation and the present defendants. At that time no doubt this lane was a lane in the ordinary acceptation of the word. It was not paved or flagged, and no one expected at that moment that any paving or flagging would be necessary: that was not contemplated by either party, but it was intended to widen the road at this place, and the agreement refers to that: and the first point which I have to consider is whether this country lane is a "street" within the definition clause, s. 3 of 10 & 11 Vict. c. 34. The jury have found that it is not a street, and obviously it was not a street, and so far as I know is not a street now in the ordinary acceptation of the word. The jury are right upon that, but I do not see how I can possibly get out of the language of s. 3, which says a "street" shall include that which this lane really is, and although the lane is not a street in the ordinary acceptation of the word, I cannot say it is not a "street" within the parliamentary definition.

Now, as to the agreement, I think it would be to strain the agreement, if I were to hold that the corporation undertook by that agreement to pave and flag that part of the widened road. No such operation was contemplated. The state of things was not such as to render it necessary to make any bargain about it. What they were to do was to widen the road and make it up, and that they have done, and what was intended and what I think is the real meaning of that expression in that agreement is this, that they should bear the expense of widening the road and making it up as was then required for the purpose of making a wider road than theretofore existed, and that they did. It becomes important to bear that in mind. I cannot say, therefore,

if the plaintiffs are entitled to recover on other grounds, that I can possibly decide this case against them on either of the two grounds I have mentioned.

That brings me to the construction of this 53rd section. The 53rd section runs thus—"If any street," which I hold includes this place, "although a public highway at the passing of the Special Act, have not theretofore been well and sufficiently paved, flagged, or otherwise made good, the commissioners may cause such street or the parts thereof not so paved and flagged or otherwise made good, to be paved and flagged or otherwise made good in such manner as they think fit, and the expenses incurred by the commissioners in respect thereof, shall be repaid to them by the occupiers of the lands abutting on such street or such parts thereof as have not been theretofore well and sufficiently paved and flagged or otherwise made good," and "such expense shall be recoverable as hereinafter provided." Now the first question that strikes me off-hand is, who is the judge of what is well and sufficiently paved, flagged, or otherwise made good. I do not think that is clear by any means, but assuming that the commissioners are themselves the judges, and assuming that the commissioners did make it good in the sense in which they intended it to be made good in 1874, subject to the word "theretofore," I should say that the commissioners could not say, after what they had done themselves, that it was not made good. That leaves of course for consideration as to what time that observation is to have reference, but taking the finding of the jury, and taking what the corporation themselves did, I should say if there were no difficulty about the word "theretofore" that this was made good and made good to the satisfaction of the commissioners themselves, inasmuch as they did it themselves. That point gets rid therefore of the question, who are to be the judges. If the commissioners are, they did make it good in 1874.

Now that brings us to the real question, and the real question is what is the meaning of the word "theretofore." With reference to that I must say I have had considerable difficulty, but I think I ought to look at s. 53 as one of a group of sections, and I am bound to say, having looked at it, I cannot see my way to put

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any construction on this Act of Parliament except that which Mr. Bompas contended for. If I look at the other members of the group and compare the "theretofore" in s. 53 with the words "then or thereafter" in s. 54, and with the word "thereafter" in s. 55, which, although repealed, I think cannot be wholly disregarded when I come to try what is the meaning of the word "theretofore" in s. 53, it occurs to me, if I look through those, it would be straining the Act to hold that "theretofore" does not mean what primâ facie it means. "If any street although a public highway at the passing of this Act have not 'theretofore.'" Contrast that with the next section. I say nothing about s. 55, although I think the argument also strong, but I think, notwithstanding the difficulty which occurred to me at the trial, and notwithstanding the apparent hardship which I see, I should be straining the Act and not construing it, as I think I am bound to do, if I were to hold "theretofore" does not mean before the passing of the special Act. It seems to me therefore for this reason, although there is a difficulty about the second "theretofore," it is not such a difficulty and not so clear as to justify me in giving to the word "theretofore" in the first part of the section that meaning which Mr. Charles contended for. Of course it makes good sense, whichever way it is read. I see what the contest is really about. Although the corporation made this road up in 1874, and made it good as was then required, the question has now arisen whether the footway should be paved and flagged, and they came to the conclusion that it ought to be, and it certainly was not paved and flagged before 1880. I now hold that to be the right time, and if it requires flagging and paving, of which they are the judges so far as that is concerned, then it strikes me they are in the right and that my judgment must be for the plaintiffs.

The defendants appealed.

Dec. 7, 10, 11, 12. *A. Charles, Q.C.* (*Bullen*, and *Bovill Smith* with him), for the defendants. The interpretation clause, s. 3, of the Towns Improvement Clauses Act, 1847, does not appear to be preserved by the schedule to the provisional order, which repeals nearly all the other provisions of 10 & 11 Vict. c. 34,

which were put in force by 20 & 21 Vict. c. xxxvii., s. 16, within Portsmouth and Portsea, and possibly the existing interpretation clause is that contained in the Public Health Act, 1875, s. 4, the plaintiffs being an urban sanitary authority, and Asylum Road lying within their district. But however that may be, it is submitted that the word "street" in the Towns Improvement Clauses Act, 1847, s. 53, is not to be construed by the help of any interpretation clause, the word being there used in its ordinary and popular sense; and in that case Asylum Road is not a "street" within the intention of the enactment. The subject-matter of s. 53 excludes the artificial meaning given by an interpretation clause; for it relates to paving and flagging, and it is unreasonable to hold that a local authority was empowered to pave and flag a country road. In *Robinson* v. *Local Board of Barton-Eccles* (1) it is pointed out by Lord Selborne, L.C., that an interpretation clause does not prevent a word to which it is applied from receiving its ordinary, natural, and popular sense, and in s. 53 the context shews that the ordinary meaning of the word "street" is alone admissible. Every section must be looked at by itself in order to see whether the enactment contained in it is to be governed by the interpretation clause. See per Blackburn, J., *Pound* v. *Plumstead Board of Works* (2). A mere country lane is not a "street:" *Reg.* v. *Vestry of St. Mary, Islington* (3); *Reg.* v. *Platts* (4); *Maude* v. *Baildon Local Board* (5). The reasoning of Cotton, L.J., in *Nutter* v. *Accrington Local Board of Health* (6) shews that the ordinary meaning of the word "street" is not to be excluded, because it is not to be found in the interpretation clause. In the view of Lindley, L.J., every road is a "street." Whether a highway is a street, is a question for a jury. *Reg.* v. *Fullford* (7).

But, further, Asylum Road was not repaired until 1874, when it was widened and made up at the expense of the corporation under an agreement with the defendants; but in 1880 the defendants were called upon to pave it. The question is whether the

(1) 8 App. Cas. 798, at p. 801.
(2) Law Rep. 7 Q. B. 183, at p. 194.
(3) E. B. & E. 743.
(4) 49 L. J. (Q.B.) 848.
(5) 10 Q. B. D. 394.
(6) 4 Q. B. D. 375.
(7) L. & C. 403; 33 L.J. (M.C.) 122.

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road had been "theretofore" made good. Lindley, L.J., thought it immaterial whether the road had been made good in 1874, and he was of opinion that the material point was whether it had been made good before 1857. The important word to be considered is "theretofore" in s. 53 of the Towns Improvement Clauses Act, 1847; but the learned Lord Justice looked at the wrong point of time. The word "theretofore" does not refer to the passing of the Act, but to the execution of the powers conferred by the Act. The section contains also the word "theretofore" a second time, and the word "thereafter." These latter words clearly refer to the execution, and ought to be construed in the same sense. Lindley, L.J. appears to have been of opinion that ss. 53, 54, 55, must be read together, and he construed s. 53 as referring to the passing of the Act upon comparing its language with that of ss. 54, 55.

In 1874 the defendants gave land to the corporation for the purpose of widening this road, and it was part of the agreement between them that the expense of widening the road should be borne by the corporation. The corporation accordingly made the road good, and even if such road be a "street," within the meaning of s. 53 of 10 & 11 Vict. c. 34, it has been found by the jury that when the corporation so widened and made the road it was then "otherwise made good" by the corporation. Having therefore once done such work, they had no power to make the defendants, as adjoining owners of land, liable for the cost of doing such work again. *Andrews* v. *Mayor, &c., of Ryde* (1) shews that the corporation being afterwards an urban sanitary authority is not therefore a different and separate body: consequently the paving by the corporation is the same as if it had been done by such sanitary authority.

[BAGGALLAY, L.J. Is the liability to repay the expenses of paving imposed by the Act on the owners of the lands abutting on the street, who were owners at the time of the passing of the special Act, or who were owners at the time the work was done?]

On the owners when the work is done. The following words in s. 53, viz., "although a public highway at the passing of the special Act," are descriptive merely of the street, and that section

(1) Law Rep. 9 Ex. 302.

should be read as enacting if any street so described has not been previously paved or made good, the owners of lands abutting on it shall repay the expense of the local authority in paving it: *The Queen* v. *Great Western Railway.* (1) In that case it was contended for the respondents that under s. 53 the commissioners would have to look at the state of the streets at the time of the passing of the special Act, and that it was no answer to say that they had once been in good repair; but Lord Campbell, C.J., said that "the construction contended for was most unreasonable and ungrammatical. The clause refers to such streets as have not theretofore been well and sufficiently paved; and that must refer to streets that have once been sufficiently paved." What the plaintiffs are in fact seeking to get in the present case, are the expenses of repairing, and not of paving and making the road.

Bompas, Q.C., and *Pitt Lewis*, for the plaintiffs. This road is "a street" within the meaning of 10 & 11 Vict. c. 34, for "street" must include everything stated in the definition clause, s. 3, to be included therein. The word "theretofore" refers to what should have happened before the local Act was passed, to the time when the commissioners under the Towns Improvement Clauses Act, 1847, come into existence.

But, further, Asylum Road had been repaired in 1874 by the corporation as corporation, and not as commissioners under the Towns Clauses Improvement Act, 1847; but the making good of the road in that year was not such as to entitle the plaintiffs then to make any charge for it.

Moreover, the words occurring in s. 53 of the Towns Improvement Clauses Act, 1847, "paved and flagged, or otherwise made good," must be read in the alternative. As Asylum Road was made good in 1874, it perhaps never could be made good again; but it might be "paved and flagged," and it is for the expense of paving and flagging the footway that the plaintiffs seek to recover in this action.

Arthur Charles, Q.C., was not called upon to reply.

BRETT, M.R. We shall not trouble the defendants' counsel to reply.

(1) 28 L. J. (Q.B.) 247.

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Brett, M.R.

This is an action brought by the corporation of Portsmouth as local authority against the defendants as adjacent owners, on the ground that they were bound to pay for the expenses of the work incurred in making good part of a "street." The case was tried before Lindley, L.J. Questions of fact and questions of law were raised. One question was left to the jury, whether the Asylum Road was a street in the popular acceptation of the word; as to this the jury answered that it was not. A further question was, whether it had been "otherwise made good" before it was flagged and paved; this was found in the affirmative. Lindley, L.J., decided in favour of the plaintiffs. The Asylum Road was within the district governed by the special Act; it had been a mere country road; it was then widened and laid out so that a hard road might be put down upon it; the plaintiffs did other work upon it; but they did not pave and flag the footway. The question as to what the corporation did, was left to the jury with reference to s. 53 of 10 & 11 Vict. c. 34. This footway not having been paved or flagged, was the road otherwise made good? It seems to me that before 1879 it had been made an artificial road. The words "otherwise made good" come in after the particular words "paved and flagged," and they must be construed as words ejusdem generis, and in my opinion they mean the making of an artificial road, for to pave and flag a way is to make it an artificial road. The question was left to the jury, and this must be the meaning of the finding of the jury. Afterwards, in 1880, the plaintiffs paved and flagged the footway, and it is said that the defendants are bound to pay for the paving and the flagging of the footway. For the plaintiffs, it has been argued that the work executed in 1874 was done by the corporation as corporation; the road was straightened and made up; could the plaintiffs do the work as corporation? now they could do it in one capacity legally, in another capacity illegally: the question, in which capacity the plaintiffs acted when they were engaged in doing the work, would be a question of fact for a jury; but it is admitted that all the evidence which could be given as to this question was given, and all the facts being before us, I think that we ought to come to the conclusion that the work was done in 1874 by the plaintiffs as the local authority.

It has been contended that the Asylum Road is not a "street;" but it is a "thoroughfare." It is true that Asylum Road is not a "street," if a "street" means a way bounded on either side by houses, and we are bound by the finding of the jury to take it that Asylum Road was not a "street" in the popular sense of the word. We must consider, however, whether it is a "street" within the meaning of the statute 10 & 11 Vict. c. 34. The interpretation clauses referred to during the argument provide that "the word 'street' shall extend to and include any road." The intention of the clauses is that in construing the Acts the word, in addition to its ordinary meaning, shall bear the meanings mentioned in the section: the words "shall include," mean "shall have the following meanings in addition to its popular meaning." I was a member of the Court of Appeal when *Robinson* v. *Local Board for Barton* (1) was decided; I find that I expressed myself in the following terms: "I think that the first remark to be made on the Act of Parliament is that it certainly deals with at least two different kinds of streets. One is a street which nobody in ordinary language without the help of an Act of Parliament would have called a street. And the other is a street which everybody without the aid of an Act of Parliament would have called a street. The interpretation clause includes under the word 'street' things which no one in ordinary parlance would call streets, as for instance, a highway which has not a house on either side of it. But where there is a certain number of houses on each side of a thoroughfare or a roadway, whichever you please to call it, everybody without the assistance of any Act of Parliament would call that thing a street, and call it nothing else. Therefore there are two totally different kinds of streets mentioned in the Act." The decision of the Court of Appeal was reversed in the House of Lords (2); but in dealing with the case the Law Lords did not object to the decision of the Court of Appeal as to the meaning of the word "street." I adhere to the language which I used in that case. We have been referred to *Maude* v. *Baildon Local Board.* (3) That case was determined by Pollock and Huddleston, BB., and North, J.,

(1) 21 Ch. D. 621, at p. 634. (2) 8 App. Cas. 798.
(3) 10 Q. B. D. 394.

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who appear to have considered that *Reg.* v. *Dayman* (1) was an authority binding upon them in that case. I respectfully differ from the judgment in *Maude* v. *Baildon Local Board* (2): I think that the learned judges in that case mistook the point actually decided in *Reg.* v. *Dayman.* (1) It has been suggested that the context in s. 53 shews that the word "street" is not there used in its ordinary sense; I cannot agree with the suggestion.

Then, what is the meaning of the word "theretofore" in s. 53 of 10 & 11 Vict. c. 34? On the one side, it is urged that it is to be read as applying to the passing of the special Act, and on the other side it is urged it must be construed as applying to the time when the work is done. If the words, "although a public highway at the passing of the special Act," could be struck out of the section, the word "theretofore" must have been referred to some words coming afterwards; but these words have been inserted, and in ordinary language "theretofore" ought to be construed as referring to some words going before, and those words are "the passing of the special Act." The word "theretofore" must consequently refer to the state of affairs existing before the passing of the special Act. It seems to me that the legislature was dealing with the powers of the local authority, and that it wished to impose a condition as to the time of the exercise of those powers; and that time was the time when the local authority takes possession of the district. It was contended that ss. 54, 55, which are not now in force within the plaintiffs' district, are not to be looked at; we must, however, look at these sections to ascertain the meaning of s. 53; the phraseology which is used in them is clear, and they plainly refer to the passing of the special Act, and the word "theretofore" must refer to the same period of time. I agree with Lindley, L.J., as to the interpretation of s. 53 upon this point.

There is, however, a further point, and notwithstanding the reasons which I have given, the defendants cannot be compelled to pay for the work done by the plaintiffs. To solve the question which now arises, we must go into the facts. Under their statutes the corporation may pave, flag, or otherwise make good the road: in the present case they made in 1874 an artificial road: it may

(1) 7 E. & B. 672; 26 L. J. (M.C.) 128. (2) 10 Q. B. D. 394.

be that it was right or even their duty to put the road into good condition; but perhaps they did it on the ground that the defendants gave up the land, in order to widen and make up the road. They made good the road in 1874, and yet it is urged that the defendants, as adjoining owners, can be made to pay for the paving and flagging of the footway, on the ground that the work has not been executed and therefore has not been paid for before. It seems to me that this construction would work injustice. It has been urged that as the adjoining owners might have been made to pay in 1874, but were not, they may be made to pay now for work afterwards executed. The result of this argument would be that local authorities would be able to make experiments at the cost of the adjoining owners. The true construction is that a local authority has power to make good or to repair the road, but it is not to be done at the expense of subsequent adjacent owners. I think that the work done by the plaintiffs in 1880 was executed under the powers of s. 53, but it was authorized by the last clause, and must be paid for out of the rates as repairs. Under other Acts of Parliament sanitary bodies may have different powers; but under this Act the plaintiffs cannot compel the defendants to pay for the work subsequently executed. This last point was not urged before Lindley, L.J., and I do not disagree with the view taken by him as to the points which he actually decided. We are bound to decide this case in favour of the defendants: they are not liable under the Act of Parliament relied on.

BAGGALLAY, L.J. I think that this appeal must be allowed, but I do not quite agree with the Master of the Rolls as to all the grounds of his judgment. The argument for the defendants was that Asylum Road was not a "street," and also that if it was a "street" nevertheless upon the construction of the statutes the defendants were not liable to pay for the cost of paving and flagging the footway.

I agree with the Master of the Rolls as to the meaning of the word "street;" the jury found that the Asylum Road was not a "street" within the ordinary and popular sense of the word; the question is as to the effect of the interpretation clauses, which

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have been cited; it was hardly contended that if the word was to be read in the sense assigned by those interpretation clauses, Asylum Road was not a "street" within the meaning of the Towns Improvement Clauses Act, 1847, s. 53; and I see nothing which induces me to give only a limited meaning to the word.

When I come to the construction of the 53rd section, I feel some doubt; but upon the whole I think that it has reference to the time when the work is done; I entirely agree that we must have regard to ss. 54, 55; but notwithstanding these sections, I think that the word "theretofore," has reference to the time when the work is performed. The words, "although a public highway at the passing of the special Act," I consider to be parenthetical only; and in that case the word "theretofore" must have reference to the time when the corporation is about to pave the road. I think that this construction is reasonable, and will avoid many difficulties which will arise if a different construction be followed. I think that s. 53 must be read as referring not to the year 1857 but to 1880. I think that no difficulty is raised by ss. 54 and 55, but that they support the construction which I have suggested; the words used are "then" and "thereafter." The form of expression is similar, but I think that a distinction may be drawn between those two words and the word "theretofore." It is unnecessary to prosecute the inquiry further, and I go back to the finding of the jury that Asylum Road had been "otherwise made good" before 1879.

BRETT, M.R. I am requested by Bowen, L.J., to say that he agrees with us that the judgment must be reversed, and also that he agrees with the reasons which I have stated.

Judgment for the defendants.

Solicitors for plaintiffs: *Williamson, Hill, & Co., for Hellard & Son, Portsmouth.*

Solicitors for defendants: *Ford & Ford, for R. W. Ford & Son, Portsmouth.*

J. E. H.

VYSE *v.* BROWN.

1884
Feb. 8.

Practice—Attachment of Debts—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 61—*Order XLV.* (1883)—"*Debt, legal or equitable.*"

In July, 1882, the plaintiff obtained a judgment against W. for 574*l.* in an action for breach of promise of marriage commenced in August, 1881. In May, 1881, W. became entitled to a legacy of 500*l.* under a will of which the defendant was executor. This legacy was in hand and ready to be paid over in October, 1881. On the 31st of May, 1881, and before the legacy became actually payable to W., he married; and on the 17th of October, 1881, he by deed between himself of the one part and the defendant of the other part assigned the 500*l.* to the defendant upon trust to invest the money and pay the annual income to his wife for her separate use for life, and afterwards upon other trusts. On the 4th of January, 1883, the plaintiff obtained an order under s. 61 of the Common Law Procedure Act, 1854, attaching any sum or sums of money then in or which might come to the hands of the defendant, to answer the judgment recovered by her against W.

Upon an issue directed to try whether on the 4th of January, 1883, there was a sum of money which the plaintiff was entitled, under Order XLV. (1883), and under the Common Law Procedure Act, 1854, to attach in the hands of the defendant, to satisfy the plaintiff's judgment debt against W.:—

Held,—by Williams, J., upon further consideration,—that, even assuming the settlement of October, 1881, to be impeachable, there was nothing in the nature of a debt, either legal or equitable, due or accruing due from the defendant to W. (the judgment-debtor) which could be attached to satisfy the judgment-debt.

THIS was an issue directed in certain garnishee proceedings to try the question whether on the 4th of January, 1883, there was a sum of money which the plaintiff was entitled, under Order XLV. of the Rules of 1883, and under the Common Law Procedure Act, 1854, s. 61, to attach in the hands of the defendant, to satisfy a judgment-debt recovered by the plaintiff, Miss Vyse, against one Horatio Joseph James Wise. The facts were these:—

The plaintiff, Miss Vyse, on the 23rd of August, 1881, commenced an action against Wise for breach of promise of marriage, and recovered judgment against him on the 20th of July, 1882, for the sum of 574*l.* Previously to the commencement of this action, viz. on the 11th of May, 1881, Wise, the judgment-debtor, had become entitled under the will of one Thompsett to a legacy of 500*l.* The present defendant, Brown, was the executor under the will. On the 31st of May, 1881, and before the legacy became

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actually payable to Wise, he married. In October, 1881, Brown passed the accounts through the Legacy Duty Office at Somerset House, and the legacy due to Wise was in hand and ready to be paid over; and thereupon, on the 17th of October, 1881, Wise, by deed between himself of the one part and the defendant Brown of the other part, assigned the 500*l.* to Brown upon trust to invest the money and pay the annual income thereof to his (Wise's) wife to her own separate use, without power of anticipation, for life, and afterwards upon other trusts. On the 4th of January, 1883, the plaintiff obtained a garnishee order attaching any sum or sums of money then in or which might come to the hands of Brown, to answer the judgment recovered against Wise.

The cause was tried before Williams, J., in the last Hilary Sittings, and was argued on further consideration on the 26th of January, 1884, by *Morgan Howard, Q.C.*, for the plaintiff, and by *H. D. Greene*, for the defendant.

For the plaintiff it was contended that she was entitled to succeed, because, first, the legacy in the defendant's hands was an attachable debt, and secondly, the settlement of the 17th of October, 1881, being post-nuptial and purely voluntary, was actually void as against the judgment-creditor; and that she was entitled to treat the legacy, for the purposes of her claim, as still due from Brown to the judgment-debtor.

For the defendant it was insisted that, even assuming the settlement to be impeachable, which was not admitted, yet that, as it was good as between the parties to it, Brown could in no sense be regarded as a debtor to Wise, and therefore there was no attachable debt.

Cur. adv. vult.

Feb. 8, 1884. WILLIAMS, J., delivered judgment, as follows:—

I am of opinion that the defendant's contention was the correct one. The Common Law Procedure Act, 1854, s. 61, authorizes the Courts upon the application of a judgment-creditor to order all debts owing from third persons to the judgment-debtor to be attached to answer the judgment-debt. But, to entitle a judgment-creditor to this form of remedy, he must shew that the garnishee (as he is called) is indebted to the judgment-debtor in

some debt, either legal or equitable, which the judgment-debtor has a right to enforce against the garnishee.

In the present case it seems to me that, even assuming the settlement of the 17th of October, 1881, to be impeachable, there is nothing in the nature of a debt, either legal or equitable, due or accruing due from Brown, the garnishee, to Wise, the judgment-debtor. As between these two, the settlement in my view stands good, and there is not the least ground for saying that the settlor could revoke the settlement or call upon Brown to pay over the 500*l.* to him.

It was argued that the settlement must be treated as void and of no effect, and that consequently Brown stood in the position of an executor holding in hand a legacy due to the judgment-debtor. There is, however, a fallacy in this argument; for, even supposing that the plaintiff had taken the proper steps to set aside the settlement as void, and had succeeded in doing so, even then Brown could never have been placed in the position of being obliged to pay over the money to Wise: the settlement would still be valid and subsisting between the parties; and, although in such a suit Brown might be directed to pay over the whole or a sufficient part of the settled fund to the creditor, that could never be by reason of his becoming indebted to the judgment-debtor: the forms of decrees in such cases invariably exclude the settlor from all interest, and direct that any surplus of the fund shall follow the trusts of the settlement.

I have assumed that the settlement is liable to impeachment: but I may state that no evidence was laid before me to shew that the settlement was otherwise than perfectly valid. The garnishee provisions of the Common Law Procedure Act are therefore wholly inapplicable.

I find the issue for the defendant, and, so far as I have power to dispose of the proceedings, I order the defendant's costs of the proceedings at chambers and at the trial to be borne by the plaintiff.

Judgment for the defendant.

Solicitor for plaintiff: *J. P. Godfrey.*

Solicitors for defendant: *Clarkson, Greenwell, & Wyles.*

J. S.

1884
May 19.

THE DIRECT SPANISH TELEGRAPH COMPANY, LIMITED *v.* SHEPHERD.

Landlord and Tenant—Covenant by Lessor to pay Rates—"All rates chargeable in respect of the demised premises"—Water supplied to Tenant by Water Company—Water-rate.

In a lease of a shop and basement and of three rooms on the third floor of the same house, the lessor covenanted to pay "all rates and taxes chargeable in respect of the demised premises." Water was separately supplied by a water company to the shop and basement, and paid for by the tenant. In an action to recover from the lessor the amount so paid:—

Held, that such charge was a "rate" within the meaning of the covenant.

THIS was an appeal by the plaintiffs under s. 6 of the County Courts Act, 1875, from the judgment of the judge of the City of London Court.

It appeared that the plaintiffs were tenants of the defendant under a lease of the 17th of October, 1883, for twenty-one years, of a shop and basement, and three rooms on the third floor, of Leadenhall Buildings in Leadenhall Street, in the city of London. The lease was entered into pursuant to an agreement, and contained a covenant by the defendant to "pay all rates and taxes payable in respect of the demised premises, except for gas consumed by the lessees within the rooms hereby demised;" and also to "keep the said water-closet, lavatory, and other conveniences in good order and condition." A water-closet and lavatory were shewn on a plan of the demised basement attached to the lease, but no mention was made in the lease of any water-closet or lavatory, except as above.

The collector of the New River Company early in 1884 tendered to the plaintiffs a demand-note for payment of 5*l.* for four quarters water supply to the shop and basement (1), and was referred to the defendant, who denied his liability, and declined to make any payment in respect of water supplied to the shop and basement. In writing to the plaintiffs the defendant pointed out that the words of the covenant applied only to cases where the lessees

(1) This supply was separate from that of the rest of the house, and was charged for separately.

had the use, in common with other persons, of gas, water-closets, and lavatory, and were not applicable to the case of an exclusive occupation such as that of the shop and basement, and had been allowed to remain in the draft of the contract by mistake. The plaintiffs, to prevent the water being cut off from their premises by the water company, thereupon paid the amount claimed and brought this action for breach of covenant. The defendant set up, among other defences, an equitable defence that the lease was made in pursuance of a prior agreement dated the 1st of August, 1882, whereby it was agreed that the lease should contain a covenant by the lessor "to pay all rates and taxes chargeable in respect of the said premises," and that the covenants in the lease were by mistake not in accordance with those of the agreement, and he claimed to have the lease rectified and reformed so as to correspond with the agreement.

The learned judge decided that the lease should be reformed, and he held that a payment for water supplied was not payment of a rate within the meaning of the covenant, "to pay all rates and taxes chargeable in respect of the said premises." He accordingly directed a verdict for the defendant, and ordered judgment to be entered for him, but he reserved leave to the plaintiffs to appeal on the question, "Is the payment for water a rate or a tax?" The plaintiffs accordingly gave notice of appeal, on the ground that the water-rate was a rate within the meaning of the defendant's covenant.

W. Graham (*Russell Spratt*, with him), for the plaintiffs. The covenant is to pay all rates, and not merely to pay parliamentary and parochial ones. Payments for a water supply are uniformly called rates in the general and other Acts dealing with the subject, such as the Waterworks Clauses Act, 1849 (10 & 11 Vict. c. 17), s. 68 et seq., and the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 56, and there is no reason in this case for excluding a water-rate from the comprehensive expression "all rates." That it is payable in respect of the demised premises is shewn by the supply being to them, and the amount of the rate determined by the value of the premises. The words of the covenant are not

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"charged on" the premises, but "payable in respect of" the premises. There is nothing unreasonable in this construction, for in this, as in many other similar cases where a large building is let out in separate holdings, the landlord can estimate the entire cost of rates and apportion them among the tenants in the amount of rent paid.

Upjohn, for the defendant. The contract in the lease has been rectified, and the question consequently is whether a water-rate or water rent is a rate chargeable in respect of the demised premises.

The New River Company's Act, 1852 (15 & 16 Vict. c. clx.), s. 3, incorporates the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17). Under the latter Act a payment for water is not a charge upon the premises, but is a mere payment for the supply of water, that is, a payment for goods sold and delivered, the price being determined by reference to the annual value of the premises occupied. The expression "water-rate" is used only as a comprehensive form to include (s. 3) "any rent, reward, or payment for a supply of water." It thus includes extra charges which are not estimated according to the value of the premises, but depend on what the extras are. A water-rate is payable by and recoverable from the person requiring, receiving, or using the supply of water (s. 68); it is payable in advance (s. 70); and is recoverable by action or a proceeding before justices (s. 74). By the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113, s. 48), an incoming tenant is not liable to pay arrears of water-rates, and under the Act of 1847 the company supplying the water has nothing in the nature of a lien on the property where the supply is delivered for the amount of the rate: *Sheffield Waterworks Co.* v. *Wilkinson.* (1) It is clear, therefore, that this is a personal demand, and not a charge on the premises.

The rates (2) intended by the covenant are rates which, like poor-rates, are a charge upon the occupier in respect of his possession. A water rate is not a rate within the Bankruptcy

(1) 4 C. P. D. at pp. 422, 424.

(2) In the Imperial Dictionary 1883) a rate is defined as "a tax or sum assessed by authority on property for public use according to its income or value; a local tax."

Act, 1869, s. 32, or the Bankruptcy Act, 1883, s. 40, which give preference to rates before the debts due to creditors.

The effect of holding a water-rate to be within the covenant will be to impose upon the landlord a charge varying at the will of the tenant, for the tenant might agree to pay by meter according to the quantity supplied, or might increase the rate by putting a bath or additional water-closets on the premises, or by causing the water to be supplied at a higher level.

W. Graham, in reply.

HAWKINS, J. I think this appeal should be allowed, and that the plaintiffs are entitled to the verdict. The whole question is whether a water-rate is included in the terms of the covenant in the lease or the agreement, for I think it is not material which is taken. By the lease the defendant is to pay all rates and taxes payable in respect of the demised premises, except for gas consumed by the lessees within the rooms demised, while the agreement does not contain the exception. Substantially the language seems to me to be the same. In this state of facts the tenant seeks to recover a sum of money which he has had to pay for the supply of water. It is said that the landlord is not liable to pay this money, because a water-rate is not within the words "all rates payable in respect of the premises demised." I am of opinion that it is such a rate, and was in the contemplation of the parties to the contract. The General Waterworks Clauses Act was passed in the year 1847, and this lease was made long after—in the year 1883. The interpretation clause of the Act uses the expression "water-rate," which it is declared shall include any rent, or reward, or payment to be paid to the undertakers for the supply of water. In the 68th section we find that water rates are to be paid by and be recoverable from the person receiving the supply of water, and shall be payable according to the annual value of the tenement supplied with water. These payments are thus brought within the terms of the covenant, for they are water rates, and are chargeable in respect of the tenement which is supplied, and according to its annual value, so that they are charged in respect of the premises. It has been

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argued that these water-rates are not chargeable upon the demised premises, but that is not the question for our determination. The 72nd section throws light on the subject, for it declares that in certain cases the owners are to be liable to the payment of the rates instead of the occupiers. The present is not one of those cases, but the covenant extends the liability of the lessor, and the plaintiffs having made the payment are entitled to recover the amount.

SMITH, J. I am of the same opinion. No one would say this was a tax, but I think it is a rate. It is contended that it is nothing but a payment for goods sold and delivered, but I cannot agree to this, for if a person were to take a house to which water was laid on, and not to consume a drop of it, the payment would still have to be made. This covenant is a very usual one in cases like the present, where a building is erected in the City and let out in flats, and the landlord knows or can estimate exactly what the expense of gas and water is likely to be, and charge the proportionate amount in the rent. This payment seems to me to be within the covenant, and I agree that the plaintiffs must retain the verdict.

Appeal allowed, and leave to appeal refused.

Solicitors for plaintiffs: *Blunt, Tebbs, & Lawford.*
Solicitors for defendant: *Moon & Gilks.*

A. M.

CUNDY, APPELLANT; LE COCQ, RESPONDENT. 1884 *May* 26.

Licensing Acts—Intoxicating Liquor—Sale to Drunken Person—Knowledge of Condition of Customer—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 13.

The Licensing Act, 1872, s. 13, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. A publican sold intoxicating liquor to a drunken person who had given no indication of intoxication, and without being aware that the person so served was drunk:—

Held, that the prohibition was absolute, and that knowledge of the condition of the person served with liquor was not necessary to constitute the offence.

CASE stated by one of the magistrates of the Metropolis, on a complaint by the respondent against the appellant under s. 13 of the Licensing Act, 1872, charging that the appellant, being the keeper of certain licensed premises, had on the 14th of January, 1884, unlawfully sold intoxicating liquor to a drunken person.

Upon the hearing of the information it was proved that there had been a sale of intoxicating liquor and that the person served was drunk. It was proved in answer to the complaint that neither the appellant nor his servants had noticed that the person served was drunk; that he had, whilst on the licensed premises, been quiet in his demeanour and had done nothing to indicate insobriety; and that there were no apparent indications of intoxication.

It was contended for the appellant that there was nothing to shew any knowledge or means of knowledge on the part of the appellant or his servants that the person served was drunk; but the magistrate held that the offence was complete on proof that a sale had taken place, and that the person served was drunk, and deemed it unnecessary to determine whether there had been on the part of the appellant or his servants a knowledge or means of knowledge of the drunkenness of the drunken person. He accordingly convicted the appellant.

The question for the opinion of the Court was whether the construction placed by the magistrate on the section was right, or whether in arriving at his decision it was necessary for him to consider whether or not the appellant or his servants knew or had

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the means of knowing, or whether they could with ordinary care have detected, that the person served was drunk.

The Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 13, enacts, "If any licensed person permits drunkenness or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding for the first offence, 10*l.*, and not exceeding for the second and any subsequent offence, 20*l.*

"Any conviction for any offence under this section shall be recorded on the licence of the person convicted, unless the convicting magistrate or justices shall otherwise direct."

Besley, for the appellant. The magistrate drew a distinction between the first part of the section as to permitting drunkenness and the second part as to selling intoxicating liquor, on the ground that in the latter case the prohibition was absolute, and no such knowledge as is implied in the word "permits" is necessary. It is submitted that no such distinction exists. There can be no offence unless there is mens rea, which in this case means that there must be knowledge or means of knowledge that the person served was drunk. Otherwise, a person might be subject to penalties for offences that he could not prevent. Here it is found expressly that there were no indications of intoxication. *Somerset* v. *Hart* (1) is an authority in favour of the appellant. It is quite true that in other sections the word "knowingly" is inserted, but that does not affect the general rule that before a person can be criminally convicted he must be shewn to have mens rea.

[He also cited *Mullins* v. *Collins* (2); *Reg.* v. *Prince* (3); *Hearne* v. *Garton*. (4)]

R. S. Wright (*Danckwerts*, with him), for the respondent. The rule that guilty knowledge is necessary to an offence is a presumption only and can be displaced. The intention of the statute must be gathered from the statute itself, as in *Nichols* v. *Hall*. (5) There are many cases of offences against public order

(1) 12 Q. B. D. 360.
(2) Law Rep. 9 Q. B. 292.
(3) Law Rep. 2 C. C. R. 154.
(4) 2 E. & E. 66; 28 L. J. (M.C.) 216.
(5) Law Rep. 8 C. P. 322.

to which the rule does not apply, as in the cases of the reception of lunatics in an unlicensed house: *Reg.* v. *Bishop* (1); adulteration of food or other articles: *Attorney-General* v. *Lockwood* (2); *Reg.* v. *Woodrow* (3); *Roberts* v. *Egerton* (4); *Fitzpatrick* v. *Kelly* (5); an assault on a constable in the discharge of his duty: *Reg.* v. *Forbes* (6), and supply by guardians of the poor of goods to be given in parochial relief: *Davies* v. *Harvey.* (7) Effect must be given to the distinction made in s. 13 itself, as well as in other sections of the same Act, between offences in which knowledge is expressly made an ingredient, and matters, such as the one in question, which are prohibited absolutely.

Besley, in reply.

STEPHEN, J. I am of opinion that this conviction should be affirmed. Our answer to the question put to us turns upon this, whether the words of the section under which the conviction took place, taken in connection with the general scheme of the Act, should be read as constituting an offence only where the licensed person knows or has means of knowing that the person served with intoxicating liquor is drunk, or whether the offence is complete where no such knowledge is shewn. I am of opinion that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a bonâ fide mistake as to the condition of the person served is not an answer to the charge, but is a matter only for mitigation of the penalties that may be imposed. I am led to that conclusion both by the general scope of the Act, which is for the repression of drunkenness, and from a comparison of the various sections under the head "offences against public order." Some of these contain the word "knowingly," as for instance s. 14, which deals with keeping a disorderly house, and s. 16, which deals with the penalty for harbouring a constable. Knowledge in these and other cases is an element in the offence; but the clause we are considering says nothing about the knowledge of the state of the person

(1) 5 Q. B. D. 259.
(2) 9 M. & W. 378.
(3) 15 M. & W. 404.
(4) Law Rep. 9 Q. B. 494.
(5) Law Rep. 8 Q. B. 337.
(6) 10 Cox, C. C. 362.
(7) Law Rep. 9 Q. B. 433.

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served. I believe the reason for making this prohibition absolute was that there must be a great temptation to a publican to sell liquor without regard to the sobriety of the customer, and it was thought right to put upon the publican the responsibility of determining whether his customer is sober. Against this view we have had quoted the maxim that in every criminal offence there must be a guilty mind; but I do not think that maxim has so wide an application as it is sometimes considered to have. In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of *Reg.* v. *Prince* (1) and *Reg.* v. *Bishop* (2), to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created. Here, as I have already pointed out, the object of this part of the Act is to prevent the sale of intoxicating liquor to drunken persons, and it is perfectly natural to carry that out by throwing on the publican the responsibility of determining whether the person supplied comes within that category.

I think, therefore, the conviction was right and must be affirmed.

MATHEW, J., concurred.

Conviction affirmed.

Solicitors for appellant: *Peckham, Maitland, & Peckham.*
Solicitor for respondent: *Solicitor to the Treasury.*

(1) Law Rep. 2 C. C. R. 154. (2) 5 Q. B. D. 259.

A. M.

WILLIAMS, APPELLANT; THE WANDSWORTH BOARD OF WORKS, RESPONDENTS. 1884 *May* 27.

Metropolis Management Acts—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 250—*Metropolis Local Management Acts Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—"*Owner*" *of Land—Land subject to Covenants—Expenses of paving New Street.*

By the Metropolis Local Management Act, 1855, s. 250, the word "owner" shall mean the person for the time being receiving the rack rent of the lands or premises in connection with which the word is used, or who would so receive the same if such lands or premises were let at a rack-rent; and by the Metropolis Local Management Acts Amendment Act, 1862, s. 77 (which is to be read as one with the Act of 1855) "owners" of land abutting on any new street are made liable to contribute towards the expenses of paving the same. The appellant, having a strip of land about 4 inches wide and 265 feet in length, abutting upon the north side of a new street, had erected a boundary fence upon the land along its whole extent, under a covenant to erect and for ever after maintain a fence thereon made with his vendor, who was owner of the land adjoining the strip on the north side:—

Held, that the appellant was the "owner" of the strip of land within the meaning of s. 250 of the Metropolis Local Management Act, 1855, and therefore liable to contribute towards the expense of paving the new street.

CASE stated by one of the magistrates of the Wandsworth Police Court, under s. 33 of the Summary Jurisdiction Act, 1879. The respondents, who are the Board of Works for the Wandsworth district, constituted under the Metropolis Local Management Acts, 1855 and 1862, took out a summons before the magistrate to obtain payment from the appellant, as owner of lands abutting upon a new street, called Shipka Road, within their district, of a sum of 88*l.*, being his proportion of the expenses incurred by them in paving the street. The appellant's land in question consisted of a strip of about 4 inches wide and 265 feet in length, bounding and abutting upon the north side of Shipka Road, and a boundary fence was erected upon it during its whole extent. The appellant erected the fence in pursuance of a covenant made by him with a third party to erect, maintain, and keep up such a fence upon the strip of land, of which the appellant retained the ownership and occupation. The strip of land was the only land of the appellant on the north side of the Shipka Road (1).

(1) It appeared during the argument that the appellant's covenant was made with the owner of the land lying north of the strip of land in

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It was admitted that the Shipka Road was a new street, and that all the preliminary steps and proceedings necessary to entitle the respondents to recover the sum of 88*l.* from the appellant (if he were liable to pay the same) had been duly taken by the respondents.

It was contended for the respondents that the appellant was an owner of land bounding or abutting upon the street within the meaning of s. 77 of the Metropolis Local Management Amendment Act, 1862, and s. 250 of the Metropolis Local Management Act, 1855, and liable, as such owner, to contribute towards the expenses of paving the street.

It was contended for the appellant that the words "owner of land" in s. 77 of the Act of 1862 meant, having regard to the interpretation clause (s. 250) in the Act of 1855, an owner of land which can be used for some purpose beneficial to the owner, and capable of yielding a rack-rent; that the appellant, therefore, was not, having regard to his covenant to erect and maintain a fence upon the strip of land, the "owner," within the meaning of the Acts; and further, that the strip of land was too small in size to be any real value to him, and was burthened besides with the maintenance of a fence of a specified kind.

The magistrate made an order upon the appellant to pay the sum claimed, holding that the appellant was an owner of the strip of land within the meaning of the Acts of 1855 and 1862, and therefore liable to pay his proportion of the expenses of paving the new street called Shipka Road.

The question for the opinion of the Court was whether, upon the facts stated, and having regard to the provisions of s. 77 of 25 & 26 Vict. c. 102, and s. 250 of 18 & 19 Vict. c. 120, the appellant was, in respect of the strip of land in question, an "owner" of land bounding or abutting on the Shipka Road.

May 20. *F. Turner* for the appellant.

R. O. B. Lane, for the respondents.

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question, from whom the appellant purchased it. By the terms of the covenant the appellant covenanted with his vendor to erect in one month from the date of the purchase deed, "and for ever thereafter maintain and repair" an oak paling upon the strip of land.

They cited *Higgins* v. *Harding* (1); *Great Eastern Ry. Co.* v. *Hackney District Board of Works* (2); *London, Brighton, and South Coast Ry. Co.* v. *St. Giles, Camberwell* (3); *Lord Northbrook* v. *Plumstead Board of Works* (4); *Plumstead Board of Works* v. *British Land Co.* (5); *Bowditch* v. *Wakefield Local Board* (6); *London School Board* v. *Vestry of St. Mary, Islington* (7); *Angell* v. *Vestry of Paddington* (8).

Cur. adv. vult.

May 27. The judgment of the Court (Hawkins and Smith, JJ.) was delivered by

HAWKINS, J. This case was argued before us last week. By 18 & 19 Vict. c. 120, s. 250, the word "owner" shall mean "the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, or who would so receive the same if such lands or premises were let at a rack rent." By 25 & 26 Vict. c. 102, s. 77 (which is to be read as one Act with 18 & 19 Vict. c. 120), the owners of the land bounding or abutting on any new street, paved under s. 105 of 18 & 19 Vict. c. 120, are made liable to contribute to the expenses of paving the same, as well as the owners of houses therein. The Shipka Road is admitted to be a new street; and it is admitted that the appellant is the freeholder of the strip of land, with the fence thereon erected, abutting or bounding it on its northern side. The only remaining question is whether that strip of land is capable of being rack rented. If it is, no doubt can arise that the appellant would be entitled to receive the same if such strip were let. The appellant seeks to absolve himself from liability to contribute towards the paving expenses upon the ground that, although he is the owner of the strip of land and fence, nevertheless he is by virtue of the covenant bound to occupy the strip for the purpose of maintaining thereon a boundary fence; and that even if he were not so bound, the strip is too narrow to admit of any beneficial occupation.

(1) Law Rep. 8 Q. B. 7.
(2) 8 App. Cas. 687.
(3) 4 Ex. D. 239.
(4) Law Rep. 7 Q. B. 183.
(5) Law Rep. 10 Q. B. 203.
(6) Law Rep. 6 Q. B. 567.
(7) 1 Q. B. D. 65.
(8) Law Rep. 3 Q. B. 714.

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We think both these objections fail. The fence in question is after all a mere boundary fence between the estate of the appellant and the vendor from whom he bought. If he had erected it voluntarily nobody could have doubted his liability. It would have amounted to an occupation of his land in a way selected by himself. It makes no difference to our minds that he so occupies it because he has agreed with his vendor so to do upon becoming the purchaser of the estate. He uses the strip for the purpose of fulfilling a covenant voluntarily entered into by himself, and to protect himself against liability for a breach of that covenant; and moreover there can be no doubt, now that the Shipka Road is made, that the strip which intervenes between the road and the adjoining property to the north, would in the event of the owner of such adjoining property desiring to have access to the road command a very considerable rent from such adjoining owner. It is unnecessary to speculate upon other profit which might be derived from the strip. The case of *Great Eastern Ry. Co.* v. *Hackney District Board of Works* (1) which was so much pressed upon us during the argument for the appellant, does not in our opinion assist him. In his judgment Lord Watson says "the authorities cited in the course of the argument appear to me to establish this proposition, that the person vested with the property of heritable subjects which have been placed 'extra commercium,' or are subject in perpetuity to the burden of a public right, which deprives him of their beneficial use, is not an owner of land within the meaning of the 77th section of the Act of 1862." There is, however, no ground for saying that the appellant's strip of land falls within this category.

In our judgment this case is in all its essential circumstances similar to *London & North Western Ry. Co.* v. *St. Pancras* (2), which appears to us to be a very strong authority in favour of the respondents, for whom we think judgment ought to be given.

Judgment for the respondents.

Solicitors for appellant: *Boulton, Sons, & Sandeman.*
Solicitors for respondents: *Corsellis, Son, & Mossop.*

(1) 8 App. Cas. 687, at p. 693. (2) 17 L. T. (N.S.) 654.

W. A.

THE SOUTHEND WATERWORKS COMPANY *v.* HOWARD.

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May 28.

Local Government Acts—Water—Supply to House—Notice to Owner to obtain Proper Supply—Non-compliance with Notice—Power to charge Rates—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 62.

A local authority caused a supply of water to be brought in main water-pipes along the street in which a house was situate, and gave notice to the owner of the house, under s. 62 of the Public Health Act, 1875, to obtain a proper supply and do all such works as might be necessary for that purpose. That notice was not complied with, and the local authority did not exercise the power given to them by that section of executing the works necessary to connect the house with the main. In an action by the water company for water-rates :—

Held, that the defendant was liable, and that it was not a condition precedent to such liability that the works necessary to bring the water into the house should have been executed.

CASE stated on appeal from the Judge of the County Court of Rochford, Essex.

The facts, so far as material to the point dealt with in this report, were as follows :—

The plaintiffs are a company incorporated by 42 & 43 Vict. c. cxx., for the purpose of supplying with water Southend and other parishes and places in Essex, including the parish of Prittlewell, which is within the district of the Southend Local Board, which is the urban sanitary authority.

The defendant is the owner of three houses in the village of Prittlewell, let to tenants, and each of them of less value than 10*l.* per annum.

In 1880 the surveyor of the Southend Local Board reported that certain houses in the village of Prittlewell, including the three belonging to the defendant, were without a proper supply of water, and the local board gave a notice to the defendant, under s. 62 of the Public Health Act, 1875, requiring him to obtain a proper supply of water and to do all such works as might be necessary for that purpose.

At that time the plaintiffs' mains were not laid in Prittlewell, but subsequently, by arrangement with the local board, they were brought into the village, the local board entering into a

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contract with the plaintiffs, purporting to bind the owners of the houses for the supply of water to them. The board then served a further notice on the defendant and other owners and occupiers in Prittlewell, who had not made connections with the plaintiff's pipes, giving them one month in which to do so, in default of which the board would themselves supply communication pipes and fittings and recover the costs summarily. The defendant, however, did not make the necessary communications nor did the local board do so.

This action was brought to recover the water-rates alleged to be due from the defendant as owner of the three houses (see s. 72 of the Waterworks Clauses Act, 1847) from the 29th of September, 1882. No question was raised as to the amount.

The question for the Court was whether the plaintiffs were entitled to charge the water-rate sued for.

The Public Health Act, 1875, s. 62, enacts, "Where on the report of the surveyor of a local authority it appears to such authority that any house within their district is without a proper supply of water, and that such a supply of water can be furnished thereto at a cost not exceeding the water-rate authorized by any local Act in force within the district, or where there is not any local Act so in force, at a cost not exceeding twopence a week, or at such other cost as the Local Government Board may, on the application of the local authority, determine under all the circumstances of the case to be reasonable, the local authority shall give notice in writing to the owner, requiring him, within a time therein specified, to obtain such supply, and to do all such works as may be necessary for that purpose.

"If such notice is not complied with within the time specified, the local authority may, if they think fit, do such works and obtain such supply, and for that purpose may enter into contracts with any water company supplying water within their district; and water-rates may be made and levied on the premises by the authority or company which furnishes the supply, and may be recovered as if the owner or occupier of the premises had demanded a supply of water and were willing to pay water-rates for the same, and any expenses incurred by the local authority in

doing any such works may be recovered in a summary manner from the owner of the premises, or may, by order of the local authority, be declared to be private improvement expenses."

Ed. Pollock for the defendant. Sect. 62 deals with the water-supply to a house. Where that is defective and a *proper supply for that house* can be furnished at a water rental not exceeding (in one case) twopence a week, the local authority may give notice to the owner requiring him to obtain "such" supply, that is, as before, a proper supply for that house, and to do all such works as may be necessary for that purpose. If the owner does not comply with the notice the local authority may "do such works and obtain such supply," that is, may do exactly what the owner ought himself to do, and for that purpose they may contract, as he might have done, with a water company. Supposing they do this, and not till then, the company that furnishes the supply may treat the owner as if, instead of being unwilling to take the water, he had demanded it, while the authority may make him pay the expense they have been put to in doing "such works," that is, the works he ought to have done to obtain a proper supply for his house. If the amount is small they may recover it summarily, or they may, if they like, spread the amount over a number of years as a private improvement rate under s. 213.

R. S. Wright, for the plaintiffs, was not called on.

STEPHEN, J. I am of opinion that this judgment should be affirmed. The matter really comes to this:—What is the meaning of s. 62 of the Public Health Act, 1875? The object of the section is to compel the supply of water to a house under certain conditions where such house is without a proper supply, and the question is how is that to be effected. It might perhaps have been made a little more plain, but I think the latter part of the section is expressed with sufficient clearness to enable us to see what it means. There is to be a report of the surveyor, and then the local authority are to give notice in writing to the owner requiring him to obtain a supply of water (of course he cannot do that before the supply is in the district), and if the notice is not complied with within the time specified, the local authority may,

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if they think fit, do the works, that is, make the connections and obtain the supply, and for that purpose they may enter into any contract with any water company supplying water within the district. They have, as I understand, done everything required by the section except make a connection between the main and the house, and actually bring the water into the house. That they are not required to do unless they think fit. They have not thought fit to do this, but have, as I think they may, left it to the owner; but they have done all they need to do, and in such case the statute says that the owner is to be treated as if he had demanded a supply of water. Whether the owner takes the water or not he is chargeable with the water-rate as if he had demanded the water. The whole question is whether the local authorities are bound before the charge can be made to make the connection, or whether they may leave it to the owner to do so, and I am of opinion that they are not bound, and that their not making the connection does not affect the liability of the owner to pay the water-rate. The judgment must therefore be upheld.

MATHEW, J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Birchams & Co.*, for *Cooper & Davies, Norwich.*

Solicitor for defendant: *Arthey, Rochford.*

A. M.

May 28.

SALM KYRBURG *v.* POSNANSKI.

Practice—Attachment, Writ of, Leave to issue—Judge at Chambers, Jurisdiction of—Judicature Act, 1873, *s.* 39—*Order XLIV., r.* 2.

A judge at chambers has power to give leave to issue a writ of attachment. So held by Grove, J., and Huddleston, B., Day, J., dissenting.

APPEAL against an order of Mathew, J., at chambers. The order appealed against gave leave to issue a writ of attachment against the defendant, for disobedience of an order made at chambers directing him to deposit in court two bills of exchange, to recover possession of which the action was brought.

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Kowalski, for the defendant, moved to rescind the judge's order. It is clear that before the Judicature Acts a writ of attachment could only be granted by the Court, and could not be issued by a judge at chambers: *Ashmore* v. *Rypley* (1); *Fall* v. *Fall.* (2) Only a court of record had power to fine or imprison for contempt: *Rex* v. *Faulkner* (3), and a judge sitting at chambers was not a court of record. The Judicature Act has not altered the law in this respect. Sect. 39 of the Judicature Act, 1873, upon which the jurisdiction of the judge must depend, only provides that any judge of the High Court may exercise the jurisdiction which any judge of any of the superior courts could have exercised in court or in chambers respectively. It does not give a judge power to do at chambers what could before have only been done in court. [He also cited *Knight* v. *Gardiner.* (4)]

Lamaison, for the plaintiff, shewed cause. A judge at chambers has power to enforce an order made by him by attachment. Order XLII., rule 24, provides that every order of a Court or judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect. By Order XLII., rule 6, a judgment for the recovery of any property other than land or money may be enforced by writ of attachment. It is submitted that the true construction of s. 39 of the Judicature Act is, that a judge may do at chambers anything which a judge sitting alone, either in court or at chambers, could have done before the Act. A judge sitting alone in the Bail Court could have allowed a writ of attachment to issue before the Act. It has been the practice since the Judicature Acts to give leave for the issue of writs of attachment at chambers. Order XLIV., rule 2, implies that a judge at chambers may give leave to issue a writ of attachment, for it says, "No writ of attachment shall be issued without the leave of the Court or a judge, to be applied for on notice to the party against whom the attachment is to be issued.

[He cited *Clover* v. *Adams* (5); *Baker* v. *Oakes* (6).]

(1) 2 Sc. N. R. 203.
(2) 2 Dowl. 88.
(3) 2 C. M. & R. 525.
(4) W. N. 1883, p. 162.
(5) 6 Q. B. D. 622.
(6) 2 Q. B. D. 171.

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Kowalski, in reply. If the effect of Order XLIV., rule 2, is to give this jurisdiction to a judge at chambers, it is ultra vires, there being no power by rules to confer a jurisdiction not given by the Act.

DAY, J. The question in this case appears to me to present considerable difficulty. Though I am sorry that there should be a difference of opinion between my Brothers and myself, I am not sorry that they are able to see their way to taking a view which is probably more convenient and certainly produces a result more in accordance with the merits of this particular case than that which I entertain. I feel, however, constrained to differ from them, though I do so with diffidence. It is clear that by the practice as it existed previously to the Judicature Acts the power of directing the issue of a writ of attachment was confined to the Courts, and could not be exercised by a judge at chambers. It is contended that by reason of the language of the Judicature Act of 1873 that power has been extended to a judge at chambers. In matters affecting, as this does, the liberty of the subject, I think we ought to look with some jealousy upon such a contention, and, unless we can plainly see that the power has been extended by express words or by necessary implication, we ought to adhere to the existing practice. It cannot be contended, as it seems to me, that this extended power has been given by express words. Has it then been given by necessary implication? It is contended that it has, and reliance is mainly placed on the language of the 39th section of the Judicature Act of 1873. I am free to acknowledge that the language of the section admits of doubt and that different views may be taken of its effect. If I could feel satisfied that by necessary implication it confers this power on a judge sitting at chambers, I would not differ from the rest of the Court. But I cannot feel so satisfied. It seems to me that, on the contrary, the opposite is the more natural and correct construction. In my opinion the word "respectively" is the key to the true interpretation of the section, and I think the intention was to give to a judge of any Division of the High Court sitting in court power to do anything which before the Act any single judge sitting in court could do, and to a judge of

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any Division of the High Court sitting at chambers power to do anything which before the Act any judge sitting at chambers could do. Any other construction seems to me to involve the result that power is given to a judge sitting at chambers to do anything which before a single judge sitting in court could have done—which I cannot think to have been the intention. Reading the section, therefore, as I do, I do not find in it any such extension of the power to issue writs of attachment as is contended for. Our attention has been drawn to Order XLIV., rule 2. It appears to me that the gist of that rule is merely to abolish the former practice, whereby in certain formal matters attachments could be obtained ex parte, as for instance, an attachment against the sheriff for not returning a writ, and to provide that in all cases writs of attachment shall be issued on application of which notice must be given. The rule uses the words "without the leave of the Court or a judge," but it seems to me that the framers of the rule probably meant nothing more by those words than "without the leave of whosoever may have power to grant an attachment," and that it cannot have been intended by those words to confer a power. It may possibly have been intended to refer to a single judge sitting by himself in court as distinguished from a Court, meaning a tribunal composed of more than one judge. In any case I do not think it substantially inconsistent with this rule that a judge at chambers should have no power to give leave for the issue of an attachment. As I have already said, the power, being one affecting the liberty of the subject, and not being given by any express words, can only be given by some necessary implication. I cannot see any such necessary implication, either on the words of s. 39 of the Judicature Act or the words of Order XLIV., rule 2. It seems to me, therefore, that the matter stands as it did according to the practice before the Judicature Act, and that, therefore, the order of the judge at chambers ought to be set aside.

HUDDLESTON, B. I do not agree with the opinion of my Brother Day. I think that a judge at chambers making an order has the power of enforcing obedience to his order by attachment. It is contended that such obedience can only be

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enforced by proceeding according to the old practice, viz., by making the order a rule of court, and applying by motion to the Court for an attachment for contempt of Court in disobeying the rule of court. It is clear that according to the practice before the Judicature Act this was the only mode of obtaining an attachment for disobedience of an order of a judge at chambers, and the question is therefore whether, under that Act, power to issue an attachment has been given to a judge at chambers.

We are informed by the masters that since the coming into operation of that Act, now a considerable number of years, it has been the regular practice for judges at chambers to give leave for the issue of attachments. I agree with my Brother Day that in matters affecting the liberty of the subject a power such as this ought not lightly to be extended, but, on the other hand, it must be remembered that it was obviously inconvenient that there should be no power of enforcing the order of a judge at chambers except by the indirect method of proceeding given by the former practice. Sect. 39 of the Judicature Act, 1873, has, it is said, extended the power of issuing attachments to a judge at chambers. Now I agree that the enactment is not as clearly worded as it might be, and that the use of the word "respectively" creates a difficulty. But if the word "respectively" be read as merely equivalent to "either," the whole is rendered consistent. The provision would then be a provision that a judge either in court or in chambers might do anything that a single judge could do before the Act either in court or in chambers. That would give a judge at chambers power to issue an attachment, because before the Act a single judge sitting in court used to issue attachments, and any power which a single judge sitting in court had before the Act is, according to this construction, given to a judge whether sitting in court or in chambers. I am supported in this view by the terms of Order XLIV., rule 2. That rule enacted that thenceforth no attachments should issue "without the leave of the Court or a judge, &c." Now by the terms of s. 39, already alluded to, "any judge sitting in court shall be deemed to constitute a Court." Therefore the case of a single judge sitting in court is included under the term "Court," and "judge" can only mean a judge

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sitting at chambers. My Brother Day thinks that the rule only relates to the abolition of ex parte attachments, but though that may be the main object of the rule we must give effect to the whole of its language if possible, and his construction entirely rejects the words "or a judge." It seems to me clear that those who framed the order must have taken the same view of s. 39 as I do, and have thought that a judge at chambers could grant an attachment, and therefore they provided for the case of attachments to be so granted. For these reasons it seems to me that this appeal should be dismissed.

GROVE, J. I have had considerable difficulty in coming to a conclusion on this case, and I regret to be obliged to differ from my Brother Day. Sect. 39 is to my mind ambiguous, and may be read in two ways. If that section had stood alone I might possibly have come to a different conclusion. But I think that the contention of the plaintiff's counsel receives considerable aid from the provisions of Order LII., rule 1, and Order XLIV., rule 2. Reading the words of s. 39, without the word "respectively," it seems to me clear that the words might be read distributively as giving to the single judge sitting either in court or at chambers all the jurisdiction which a single judge before had whether in court or at chambers. I admit that the word "respectively" does create some difficulty, and I understand my Brother Day's judgment to be based on the view that the word imports that a judge of any Division of the High Court at chambers only has under the section all the jurisdiction which any judge at chambers had before the Act. I think the expression "respectively" does tend towards that construction. But it is necessary to consider that expression in relation to the rest of the section. The whole provision as to jurisdiction is expressed to be "subject to any rules of court," and the section goes on "or as may be directed or authorized to be so heard by any rules of court to be hereafter made," so that, if Order XLIV., rule 2, were in affirmative instead of negative terms, there seems to me no doubt that a judge at chambers would have been authorized by it to grant attachments. The concluding provision of s. 39 is that "any judge sitting in court shall be deemed to constitute a Court." Applying this

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last provision to rule 2 of Order XLIV., it is clear that "judge" in that rule must mean "judge at chambers," because a judge sitting in court is already included in the word "Court." If the rule had said "a writ of attachment shall issue by leave of the Court or a judge," it seems to me clear that the power of granting attachments would have been extended to a judge at chambers. It is true that the words are negative, and it is not enacted in terms that a writ of attachment shall issue by leave of a judge, but I am inclined to think that it is a necessary implication from the words of the rule that a judge at chambers is to have the power. No meaning whatever can be given to the words "or a judge" if this is not so. It seems to me that the provision that a writ of attachment shall not issue without the leave of a judge must necessarily imply that a judge has power to give leave for the issue of such a writ, or otherwise an absurdity is produced. This view seems to me to receive some confirmation from the provisions of Order LII., rule 1, for in that rule when a judge sitting in court is meant the term "judge in court" is used. We are informed that the practice ever since the Judicature Act has been that writs of attachment have been issued by judges at chambers. This of course is not conclusive upon us, but it seems to me to afford an argument to the extent that it is a reason for not interfering with the actually existing practice unless the arguments against it strongly preponderate. For these reasons I am of opinion that the judge had power to make this order, and that the appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *Hulbert.*

Solicitors for defendant: *Mozley & Dennison.*

E. L.

HUNTER, APPELLANT; JOHNSON, RESPONDENT. 1884 June 16.

Elementary Education—Board School—School Hours—Home Lessons—Unlawful Detention of Scholar—Assault—Elementary Education Acts, 1870 (33 & 34 *Vict. c.* 75) *and* 1876 (39 & 40 *Vict. c.* 79).

The Elementary Education Acts, 1870 and 1876, do not authorize the setting of lessons to be prepared at home by children attending a board school. The detention at school after school hours of a child for not doing home lessons is therefore unlawful, and renders the master who detains the child liable to be convicted for an assault.

CASE stated by justices.

The appellant was a child, ten years of age, residing with his mother, and attending the "mixed" department of the Tyersal Board School, one of the schools of the Bradford School Board, of which the respondent was head master.

The by-laws made by the Bradford School Board under the Elementary Education Acts, 1870 and 1876, and sanctioned by Order in Council, contained the following clause with reference to the hours of attendance:—"The time during which every child shall attend school shall be the whole time for which the school selected shall be open for instruction of children of similar age, including the day fixed by Her Majesty's Inspector for his annual visit."

The school hours in which schools belonging to the Bradford School Board were open for the instruction of children of a similar age to the appellant, were from 9 a.m to 12 noon, and from 2 p.m. to 4.30 p.m. during five days a week.

It was the practice, in compliance with directions of the School Board, for the teachers of the different schools belonging to the Board, to set the children attending the schools, "home lessons," that is scholastic work, to be done at their respective homes out of school hours.

The mother (and guardian) of the appellant forbade him to learn or do home lessons, and gave notice of this to the respondent. On the 20th of September, 1883, the appellant accordingly had not learned the home lessons set him on the previous

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day, and he was kept in by the respondent and prevented from leaving the school after the regular school hours for three-quarters of an hour, from 12 noon to 12.45 p.m., and made to learn the home lessons during such keeping in. He was not kept in for any other reason or purpose.

An information was laid for a common assault against the defendant, and at the hearing the justices dismissed the summons, holding that no assault punishable by the criminal law had been committed. The justices gave no opinion or decision regarding the legality or otherwise of enforcing home lessons.

The question for the Court was, "Had the respondent, under the facts stated, any legal power to keep in the appellant for not doing home lessons?" If the Court should be of opinion in the negative, then "ought the justices to have convicted the respondent for an assault punishable by the criminal law?" If so the case was to be remitted that a conviction might be entered.

Woolf, for the appellant. There is no power under the Elementary Education Acts, 1870 and 1876, for the School Board, to make by-laws regulating what the children are to do out of school. The parent's liability to have a child educated is statutory, and extends only to sending the child to school during school hours for instruction. The order to the child to do home lessons was unauthorized and inconsistent with the provisions of s. 9 of the Act of 1876, which contains exceptions to the prohibition in s. 5 of the employment of children out of school hours. As the order to do the lessons was unauthorized, the child could not lawfully be punished for breach of it. The detention was an unlawful imprisonment, for it was a restraint on the liberty of the child, and consequently it was an assault for which the justices should have convicted the respondent: 1 Russell on Crimes, 4th Ed., p. 1023; *Bird* v. *Jones* (1).

No one appeared for the respondent.

MATHEW, J. The arguments of Mr. Woolf have convinced me on both points raised. With reference to the first point it,

(1) 7 Q. B. 742.

appears, that having regard to the enactments and the by-laws of the School Board, they have no authority to impose upon children the duty of studying at home. We are compelled to deal with the matter of education as a statutory interference with the liberty of the subject, and the statute must be construed in the ordinary way. I thought at first that it might be possible to treat this as a matter of school discipline, and within the powers generally exercised by persons in charge of the education of children. Ordinarily an important part of a child's education is the study at home, but here the child has been punished for disobedience of an order which the schoolmaster had no power to make. I had some doubt also as to whether the facts stated on the case would amount to an assault; but bearing in mind the notice that had been sent to the schoolmaster by the mother, and the fact that the child was kept in as a punishment, and could not have got away, I think the case is brought within the authorities that have been referred to. It is therefore a case for a conviction and the infliction of a nominal penalty, and the case must be remitted to the magistrates accordingly.

DAY, J., concurred.

Case remitted.

Solicitors for appellant: *Indermaur & Brown, for Rhodes, Bradford.*

A. M.

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March 31.

IN RE JORDAN. EX PARTE HARRISON.

Bankruptcy—Practice—Application to Court by Equitable Mortgagee for a Sale —Insufficient Security—Conduct of Sale—Costs of Trustee—Bankruptcy Rules, 1870, *rr.* 78, 79, 80—*Bankruptcy Rules*, 1883, *rr.* 68–70.

When an equitable mortgagee applies to the Court to realize his security, the conduct of the sale is in the discretion of the Court. As a general rule where the security is sufficient the conduct of the sale will be given to the trustee, but where the security is insufficient the conduct of the sale will be given to the mortgagee. In either case the costs, charges, and expenses of the trustee, properly incurred, will be a first charge upon the proceeds of sale.

THIS was an appeal from the decision of the judge of the county court at Burton-on-Trent, in Staffordshire.

On the 29th of September, 1883, R. Jordan filed his petition in the county court at Burton-on-Trent, and at the first meeting of the creditors thereunder, held on the 17th of October, 1883, certain resolutions for liquidation by arrangement were duly passed, and C. Harrison was appointed the trustee with a committee of inspection.

At the date of the liquidation Lloyds' Banking Company, Limited, were equitable mortgagees of R. Jordan for upwards of 2300*l.* on the deposit of the title-deeds of a leasehold brickfield, an insufficient security.

On the 20th of February, 1884, the county court judge, on the application of the bank, ordered (inter alia) (1), that the property comprised in their security should be sold either in one or more lots at such time or times and in such manner as the company in their discretion should think fit; (2), that the company should have the conduct of the sale and should prepare the particulars, conditions, and contracts for sale and other documents in connection therewith, and that the particulars and conditions of sale should be submitted to and approved by the registrar of the Court; (3), that notice of such sale should be published in certain named papers; (4), that the trustee should join in the conveyance or conveyances to the purchaser or purchasers, and that the draft of any conveyance (in case of dispute) should be settled by the registrar of the Court; (5), that the moneys to arise from such

sale or sales should be applied in the first instance in payment of the costs, charges, and expenses of the bank in and about their said security, and of their application to the Court thereunder, and of and attending such sale or sales as aforesaid, and then in payment and satisfaction so far as the same should extend of the moneys secured and owing to the bank by and on their said security, and that the surplus of the proceeds of such sale or sales (if any) should be paid to the trustee; (6), that the trustee should within seven days from the service of the order on him deliver over on oath to the bank all deeds, documents, and writings in his possession, custody, or power relating to the said security and the premises comprised therein.

The trustee appealed against this order.

E. C. Willis, Q.C., and *C. Gould*, for the trustee. The principal objection is that the trustee is deprived of the conduct of the sale and of his costs. This is an application under rules 78 to 80 of the Bankruptcy Rules, 1870, which are re-enacted by rules 68–70 under the new Act. It is the practice to give the trustee the conduct of the sale, and the rules are imperative, and provide that his costs, charges, and expenses are to be a first charge on the proceeds of sale. No doubt the conduct of the sale can be taken away from a trustee for misconduct, but here no sufficient reason is shewn for depriving him of it or of his costs in relation to it. Then the order gives the mortgagees an absolute discretion as to the time and place of sale, but it is for the Court to fix a place and to limit a time within which the sale should be made. Lastly, the Court cannot order the trustee to deliver up on oath to the mortgagees the documents in his possession, but he does not object at the cost of the mortgagees to make an affidavit as to documents and produce them for inspection.

Yate Lee, for the mortgagees. The respondents do not object to the Court fixing a time and place for the sale, and they consent to pay the costs of the trustee in all matters in which they require his concurrence and for all such acts or affidavits as they require him to do or make. As to the conduct of the sale, the order is rightly made. The Court has a discretion in the matter.

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This is an insufficient security, and there is no reason why the bank should pay the costs of the trustee. In Chancery when an equitable mortgagee applies to the Court to realize his security the mortgagor never gets his costs. The procedure in Chancery was established by the Chancery Amendment Act (15 & 16 Vict. c. 86, s. 48). Then the 65th and 66th sections of the Bankruptcy Act, 1869, conferred upon the Court of Bankruptcy all the powers and jurisdiction of the Court of Chancery. The jurisdiction conferred by these sections is illustrated by *Ex parte Anderson* (1), and *Ex parte Sheriff of Middlesex* (2) Under those Acts and cases an equitable mortgagee is entitled to apply for the realization of his security either to the Court of Bankruptcy or to the Court of Chancery, and as the Court of Chancery gives a more favourable relief, Seton on Decrees, 4th ed. p. 1128, the same rule should be applied in bankruptcy when the security is insufficient.

Willis, Q.C., in reply.

CAVE, J. I do not feel at liberty to adopt the ingenious argument which has been urged upon me by Mr. Yate Lee, that I am to look at the course of procedure in Chancery in order to see what kind of order ought to be made in Bankruptcy. In this case the present respondents came to the Court of Bankruptcy, and they ask to have an order made in a matter which is specifically provided for by rules 78 to 81, and I think that the order which they ask for can only be properly made under those rules.

Now, the main contention has been that under those rules the trustee is entitled to have an order which shall direct that his costs of and occasioned by the application to the Court, and of and attending the sale, shall be made a first charge on the proceeds of the sale; and, further, that the Court must, in some way or other, give effect to rule 80, by giving him some costs of the application, although Mr. Willis admits that those costs might be limited in different ways. I do not think that rule 80 can be read in that way. I do not think it was the intention of that rule in any way to fetter the discretion of the Court in dealing with the costs of the application. Any fetter of that kind placed

(1) Law Rep. 5 Ch. at p. 479. (2) 10 Ch. D. 575.

upon the discretion of the Court would, in my opinion, work most injuriously. When once it was known that the Court was compelled to give to the trustee the costs of the application, there would be that of which some indications seem apparent in this case, namely, unnecessarily long affidavits and unnecessary expense. As I read rule 80, it does not compel the Court to forego the discretion which it has with regard to the costs of all applications before it. The Court must still exercise its discretion. If it comes to the conclusion that the trustee ought not to have the costs of the application, I see nothing in that rule which compels the Court, against its own discretion, to give those costs. I think the rule does come to this, that if the Court thinks fit to give the costs of the application, then the Court is bound to make the costs of the application a charge on the proceeds, and that that is the real and true sense in which that rule must be read. So again, with regard to the costs of the trustee of and attending the sale, it is quite possible that the Court may think fit to direct, and indeed the rule appears to contemplate that in ordinary cases it will direct, that the trustee shall have the conduct of the sale; and, undoubtedly, if the trustee has the conduct of the sale, he must necessarily incur expenses with relation to the sale, and those expenses must, in that case, be made a first charge upon the proceeds of the sale. But it may appear to the Court proper that the trustee should not have the conduct of the sale, and a case where it is not expected that there will be any surplus seems to me, generally speaking, a proper case for exercising the discretion of the Court in that way. In cases of that kind it undoubtedly is to the interest of the mortgagee to obtain the utmost amount. He has no contrary interest, because the utmost that can be obtained will not be sufficient to pay him his debt in full. If it is likely that more will be obtained, then he has not an interest in obtaining more, while a trustee has, and in such a case it would be extremely proper that the trustee should have the conduct of the sale. Then if the trustee has the conduct of the sale rule 80 requires that his expenses should be made a first charge on the proceeds. If he has not the conduct of the sale, then it will be necessary for the Court further to

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consider what expenses he ought properly to incur, because if he has not the conduct of the sale it may be that there is little or no expense to which he should properly go; but when there are expenses which he ought properly to incur, then, under rule 80, those expenses ought to be made a first charge upon the proceeds. If when the application is made, the Court can see that there are no expenses which the trustee should properly incur, so far as the Court can see at that time, then it does not appear to me to be necessary for the Court to direct that he should have indefinite costs and expenses of which at that time there is no conception. If there is anything which may necessitate the interference of the trustee, it seems to me that that is properly met by such a reservation as is contained in this order, namely the reservation of "liberty to apply." It may be, of course, that the person intrusted with the conduct of the sale may not discharge the duty which is incumbent upon him with a due regard even to his own interests, and in that case the trustee, with a view of reducing the amount of the excess for which proof will be sought to be made against the estate, should be at liberty to come before the Court to make an application. In this case that liberty is reserved to the trustee, and if any such application is made, it will be a question for the Court what ought to be done, and if anything the Court directs is likely, in the view of the Court, to result in costs or expenses to the trustee, then it will be proper that provision should be made for those costs and expenses as a first charge upon the proceeds of the sale.

Those being the general principles which, in my opinion, ought to be applied in this case, let me now come to deal with the different objections seriatim.

The first part of the appeal is against so much of the order as declares what is the amount due. I understand that no objection is really taken now to that, as the bank do not claim to prove for any interest since the liquidation. The first part of the order, therefore, will be dealt with by inserting that the bank do not claim any right to prove for any interest since the liquidation.

The next point is about the sale. I do not see any real objection, but the trustee asks the Court to fix a limit of time, and for

that I am referred to rule 78, which says "the Court will then direct notice to be given in such public papers as it shall think fit, when, and where, and by whom, and in what way the said premises or property over which the security shall extend, are to be sold." The order directs the bank to give notice in the papers, when, where, and by whom the property is to be sold. The trustee objects that that direction gives them an absolute discretion, and I apprehend it does; I do not see why it should not. What the rule says is, the Court must direct an advertisement to be inserted in the newspapers, stating when, where and how the property is going to be sold. The Court says to the bank, "you must insert an advertisement in the newspapers stating when, where, and how the property is going to be sold, but when, where, and how the property is going to be sold you must fix yourselves." The rule does not seem to preclude that, but I will add "ten days' notice of the time and place of sale to be given to the trustee."

The next objection is that the bank are to have the conduct of the sale. The order provides:—"The said company shall have the conduct of the sale of the hereditaments and property aforesaid, and shall prepare the particulars and conditions for sale and all other documents in connection therewith." I have already dealt with this objection, but I think that copies of the particulars and conditions should be sent to the trustee ten days before the sale. If he thinks there is anything wrong in them he can then apply under the "liberty to apply" which is given, and his costs will be dealt with then. The order then goes on, "That Charles Harrison, the trustee of the property of the said debtor, shall join in the conveyance or conveyances to the purchaser or purchasers of the said hereditaments, properties, and tenements." I understand there is no objection to his joining in the conveyance provided his costs are paid. I propose to add, "Harrison's costs of joining to be paid as hereinafter directed." Then the order proceeds: "That the money arising from such sale or sales shall be applied in the first instance"—I propose there to insert "in payment of the costs of the trustee herein directed to be paid, such costs to be taxed by the registrar, and in the second

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place, in payment of the costs, charges, and expenses of the company." Then, as to documents the order will run "that the said Charles Harrison shall within five days from the date of the said order make an affidavit of the documents and writings in his possession, custody, or power, relating to the said security, and the premises comprised therein, the trustee's costs of such affidavit to be paid as hereinbefore directed." The affidavit will only be made if the respondents require it. Then with regard to the costs of the application in the Court below, I have already said I think the judge had a discretion, and I do not see any reason for interfering with that discretion. That disposes of the whole matter except the costs of this appeal. Substantially, the respondents have succeeded, and I think they must have their costs of this appeal; but the trustee must be allowed to take them out of the estate. In a future case probably a trustee who fails in an appeal will have to pay his own costs of the appeal, but inasmuch as this is a somewhat new point, and it is important that the practice should be settled, I do not think it right and fair that the practice should be settled at the expense of this individual trustee. I think therefore this is a proper case for the trustee to have the costs out of the estate.

Order appealed from affirmed with variations.

Solicitors for trustee: *Tucker & Lake.*
Solicitors for bank: *Geare, Son, & Pease.*

H. L. F.

IN RE MACKINTOSH. EX PARTE MACKINTOSH. 1884 April 23.

Bankruptcy—Pending Action in Chancery Division—Non-payment of Trust Money into Court—Motion for Writ of Attachment—Bankruptcy of Trustee—Debt provable in Bankruptcy—Jurisdiction of Bankruptcy Court to interfere—Bankruptcy Act, 1883, *s.* 9, *sub-s.* 1, *and s.* 10, *sub-s.* 2.

The plaintiff in an action in the Chancery Division having failed to pay into Court, when ordered, a sum of money which he had received in a fiduciary capacity, was served with a notice of motion for a writ of attachment against him. He thereupon filed his petition in bankruptcy, and applied to the Court of Bankruptcy, under s. 9 of the Bankruptcy Act, 1883, to stay further proceedings in the action on the ground that the claim against him was a debt provable in his bankruptcy:—

Held, that his application must be refused, for that no good reason was shewn why the Court of Bankruptcy should interfere.

Semble, the jurisdiction conferred on the Court of Bankruptcy by s. 9 of the Bankruptcy Act, 1883, is discretionary, and will not, as a general rule, be exercised in favour of a bankrupt personally, where he has by some misconduct in some other proceedings rendered himself liable to imprisonment.

IN 1880 an action of *Mackintosh* v. *Chalmers* was commenced in the Chancery Division of the High Court, for the dissolution of a partnership and other consequential relief. In November, 1882, a decree was made by Bacon, V.C., directing various accounts and inquiries, and in the result a sum of 1104*l.* 4*s.* 1*d.* was found to be due from the plaintiffs, L. Mackintosh and C. J. Dudgeon, to Mrs. A. J. Chalmers, a defendant in the action, being moneys which they had received in trust for her, and in November, 1883, on the hearing on further consideration, they were ordered to pay this sum into Court within fourteen days.

The 1104*l.* 4*s.* 1*d.* was not paid into Court, and on the 22nd of February, 1884, Mrs. A. J. Chalmers served L. Mackintosh with a notice of motion for a writ of attachment against him, and thereupon he filed his petition in bankruptcy, and now applied to the Court of Bankruptcy to restrain further proceedings in the action of *Mackintosh* v. *Chalmers*, and also in certain other actions pending against him in the Queen's Bench Division.

Northmore Lawrence and *J. E. Linklater*, for the motion. The application is made under the 1st subsection of the 9th section of

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the present Act, which is similar in substance to the 12th section of the late Act. This is a provable debt, and therefore not enforceable by attachment, and the bankrupt's order of discharge will free him from everything but a "fraudulent" breach of trust. This is not a fraudulent breach of trust, but a sum found to be due from the bankrupt which he had received in a fiduciary capacity. He has not been charged with fraud. *Cobham* v. *Dalton* (1) decides the point under the old practice; and the *Earl of Lewes* v. *Barnett* (2) and *Ex parte Hemming* (3) also illustrate the rule. That being the settled practice, it would require very strong and express words in the present Act to override it.

[CAVE, J.:—How do you read the concluding words in the 1st subsection, "unless with the leave of the Court or on such terms as the Court may impose"?]

Those words only qualify the last clause in the subsection, and do not apply to the first clause, which is absolute in its terms. But if they govern the whole subsection and give the Court a discretion, it is this Court which, directly bankruptcy supervenes, is the Court to exercise the discretion and to protect the bankrupt. It has been the invariable practice under the late Act to grant these applications. The interests of the bankrupt's creditors might be very injuriously affected by his being attached, because, under s. 24, he has to render every personal assistance and information to the trustee in the realization of his estate.

Hemming, Q.C., and *S. B. L. Druce*, for Mrs. Chalmers. The 12th section of the late Act and the 9th section of the present Act are not in pari materiâ. The 9th and 10th sections of the present Act must be read together and give the Court an absolute discretion in the matter.

[CAVE, J. I do not think that the 10th section must necessarily be read in restriction of s. 9. Why is this application made to me? If s. 9 prohibits the attachment, it is an answer to the motion pending before the Vice-Chancellor. If, on the other hand, the Court has a discretion, why should I interfere?]

The respondent's contention is that this Court has a discretion

(1) Law Rep. 10 Ch. 655. (2) 6 Ch. D. 252.
(3) 13 Ch. D. 163.

in the matter, which, under the circumstances, it will decline to exercise.

Northmore Lawrence, in reply.

CAVE, J. In this case the bankrupt is not entitled to any protection except such as is afforded to him by the 9th section of the Bankruptcy Act, 1883. If that section protects him, I do not see why I should interfere. I sit here to administer his estate in bankruptcy and to take care of it for the benefit of his creditors, but not to protect him personally if he has brought himself within the reach of the law in any other matter. It is contended, however, that under this 9th section the bankrupt cannot be committed to prison. If that is so, when the motion to commit comes before the Vice-Chancellor he will dismiss it. He has no more power to disregard this section than I have, and I am certain he has no more will. If he thinks he is precluded by the section he will, as I have said, refuse the motion; and if it is a case in which he has a discretion as well as myself, he is far more conversant with the practice under the late Bankruptcy Act in such cases and with the details of this case than I am, and therefore more competent to decide this question than I am. I think, therefore, that I must leave this matter to be dealt with by the Vice-Chancellor. No ground whatever is shewn why I should interfere. If the official receiver, or the trustee in bankruptcy, or some of the creditors had made this application and given me some good reasons why I should interfere, it might have been different. I do not say it would. But, under the circumstances, I am clearly of opinion that this application must be refused with costs.

Application refused.

Solicitors for debtor: *Lawrence, Plews & Baker.*
Solicitors for respondent: *Harwood & Stephenson.*

H. L. F.

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May 29; *June* 10.

IN RE LOWENTHAL. EX PARTE BEESTY.

Bankruptcy—Conflicting Claims between Strangers to the Bankruptcy—Jurisdiction—Bankruptcy Act, 1869, *s.* 72—*Bankruptcy Act*, 1883, *s.* 102, *sub-s.* 1.

The jurisdiction conferred on the Court of Bankruptcy by sub-s. 1 of s. 102, of the Bankruptcy Act, 1883, is identical with that conferred on that Court by s. 72 of the Bankruptcy Act, 1869.

Where, therefore, there are conflicting claims to any part of a bankrupt's property, between parties who are strangers to the bankruptcy, and in which the trustee in bankruptcy has no interest, the Court of Bankruptcy will decline to adjudicate upon the questions at issue.

THIS was a motion on behalf of J. W. Beesty, carrying on business under the style of the Foreign Wool and Skin Company, that Messrs. Glyn, Mills & Co., the bankers, might be ordered to deliver up to him the warrants of thirty-eight bales of sheepskins deposited with them by R. Lowenthal, the bankrupt, as security for an advance of 600*l.*

The bankrupt was a wool broker, and in the month of February, 1884, was instructed by J. W. Beesty to purchase for him sheepskins to the value of 1700*l.*, and accordingly the bankrupt, on the 19th of February, purchased in his own name, but for and on account of J. W. Beesty, fifty-eight bales of sheepskins amounting with the brokerage to 1747*l.* 16*s.* 9*d.*, which sum was paid by J. W. Beesty as to 1000*l.* by his acceptance at three months (which was met at maturity), and as to 500*l.* in cash, leaving a balance of 247*l.* 16*s.* 9*d.* due from him.

The bankrupt delivered to J. W. Beesty twenty of the bales of sheepskins, but pledged the warrants for the delivery of the remaining thirty-eight bales with his bankers, Messrs. Glyn, Mills, & Co., as security for an advance of 600*l.*

The bankrupt absconded on the 27th of February, and a few days afterwards a bankruptcy petition was presented against him.

J. W. Beesty applied to Messrs. Glyn, Mills, & Co. to deliver up to him the warrants for the thirty-eight bales of sheepskins, but they refused to do so unless they were paid the 600*l.*, and they also required the consent of the official receiver, hence the motion.

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E. Beddall, for the motion.

J. E. Linklater, for the bankers, took the preliminary objection that the Court had no jurisdiction. This is not a question arising in the bankruptcy, but a contest between Messrs. Glyn & Co. and Mr. Beesty, strangers to the bankruptcy, which raises important questions under the Factors Acts, and whatever the result may be, the bankrupt's estate will not be affected at all, and the trustee will not be in any way interested. The motion is made under the 1st sub-section of s. 102 of the Bankruptcy Act, 1883, which is identical in its terms with s. 72 of the Bankruptcy Act, 1869, and under the late Act the authorities are conclusive that this is an application which this Court will not entertain: *Ellis* v. *Silber* (1); *Ex parte Dickin* (2); *Ex parte Brown* (3); *Ex parte Smith* (4).

E. Beddall. The authorities cited do not apply. Under the late Act, the Court of Bankruptcy was a separate Court with a separate jurisdiction. Under ss. 92 and 93 of the new Act it is now a branch of the High Court with all the jurisdiction of the High Court, and as a branch of the High Court it has unlimited jurisdiction to determine all questions and to do complete justice between the parties. This is shewn by the proviso in the 1st sub-section of s. 102 of the new Act, which limits the jurisdiction of the county courts in such cases. In other words the Court of Bankruptcy has now jurisdiction to decide all questions, whether arising out of bankruptcy or not. But if the cases under the late Act apply, they shew that the jurisdiction of the Court of Bankruptcy is unlimited, and that in every case it is a question of discretion and expediency: *Halliday* v. *Harris* (5). Under the circumstances this is a case in which it is expedient that the question should be settled and decided here and that the parties should not be relegated to the ordinary tribunals.

Mr. Aldridge (solicitor) for the official receiver, claimed no interest in the property.

J. E. Linklater, in reply. The jurisdiction in bankruptcy rests entirely on the Bankruptcy Act, and if this jurisdiction is not given by the Act, this Court, as the Court of Bankruptcy, has no

(1) Law Rep. 8 Ch. App. 83.
(2) 8 Ch. D. 377.
(3) 11 Ch. D. 148.
(4) 2 Ch. D. 51.
(5) Law Rep. 9 C. P. 668.

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greater jurisdiction than that conferred by the late Act. As to the proviso in sub-s. 1 of s. 102, that does not extend the power conferred by the preceding part of the sub-section. The construction of that sub-section is settled and limited by the authorities that have been cited. Even if the trustee had some claim for the balance of the purchase-money for these skins, *Ex parte Smith* (1) is conclusive that this Court has no jurisdiction.

Cur. adv. vult.

June 10. CAVE, J. In this case Mr. Beddall moved, on the part of Mr. Beesty, for an order on Messrs. Glyn & Co. to deliver up to him the warrants for some sheepskins which had been deposited with them by the bankrupt by way of pledge to secure advances. The bankrupt purchased certain skins, including those in question, for Mr. Beesty, for the sum of about 1750*l.*, of which Mr. Beesty has paid 1500*l.* The bankrupt had warehoused some of the skins in his own name, and subsequently pledged the warrants with Messrs. Glyn & Co., who claim to be entitled to hold them under the Factors Acts until their advances have been repaid. Mr. Linklater, who appeared for them, took a preliminary objection that this Court had no jurisdiction to make the order, and as the case is one of general importance, I took time to consider my judgment.

The Court of Bankruptcy has exclusive jurisdiction over personal claims against the bankrupt which are provable in bankruptcy, and also over the assets of the bankrupt which come into the hands of the trustee to be administered; and the debtor and his creditors who are the parties to the administration in bankruptcy, and the trustee, as the person intrusted with that administration, are subject to that jurisdiction.

The Court of Bankruptcy, by s. 72 of the Act of 1869, was invested with jurisdiction over third parties for the purpose of deciding all questions of priorities and all other questions whatsoever which might arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court might deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in

(1) 2 Ch. D. 51.

any such case. The jurisdiction so given was, it should be noticed, concurrent and not exclusive, and moreover was discretionary, and not to be invoked as of right. The cases which were decided upon this section established, first, that where by the operation of the law of bankruptcy the trustee had a higher and better title than the bankrupt—where, for instance, a transaction was impeached as a fraudulent preference or an act of bankruptcy—the Court of Bankruptcy had under this section and ought to exercise jurisdiction: *Ex parte Brown* (1); unless (in the case of a county court) a large amount was at stake: *Ex parte Armitage* (2); *Ex parte Price* (3); secondly, that where the trustee claimed only the same right as the bankrupt himself would have had, the Court of Bankruptcy, if it had jurisdiction under section 72, ought not to exercise it: *Ex parte Dickin* (4); *Ex parte Brown* (1); and, thirdly, that the Court of Bankruptcy had no jurisdiction to entertain personal claims between third parties or claims to property as between third parties, although the decision of such question might also decide which of such third parties should prove against the bankrupt's estate.

It is with the third proposition alone that I am now concerned, and I will shortly refer to the authorities by which it is supported. In *Ex parte Lyons* (5) the Court of Appeal held that the Court of Bankruptcy had no jurisdiction to set aside, on the ground that it had been obtained by pressure, a bill of sale given by a debtor who had effected a composition to secure a bill of costs of a receiver appointed under the petition for liquidation. In that case James, L.J., observed: "The world has already been startled at the extent of jurisdiction assumed by the Court of Bankruptcy under s. 72, and it behoves us to be careful before we enlarge it and before we allow any branch of the Court of Bankruptcy to set aside solemn deeds on equitable grounds, merely because they had their inception in or were somehow connected with bankruptcy proceedings. The case does not come within sect. 72, the object of which is to provide a summary remedy in matters relating to the distribution of the estate or

(1) 11 Ch. D. 148.
(2) 17 Ch. D. 13.
(3) 21 Ch. D. 553.
(4) 8 Ch. D. 377.
(5) Law Rep. 7 Ch. 494.

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otherwise arising or really connected with bankruptcy proceedings. I should be sorry to limit the jurisdiction of the Court as to anything which can be said to be a matter incident to the bankruptcy proceedings. But it does not follow because there has been a relation between two parties founded on bankruptcy proceedings that every dealing between them having any connection with that relation is drawn within the jurisdiction of the Court of Bankruptcy." In *In re Motion* (1), Selborne, L.C., says: "Sect. 72 gives the Court a very large authority to decide such questions as it may be found necessary or convenient to determine for the proper purposes of the administration in bankruptcy. But it does not, as we understand it, at all enable the Court of Bankruptcy to draw compulsorily within the sphere of its jurisdiction property or the owners of property not vested in the assignee, and not originally subject to the administration in bankruptcy." The same language is held by James, L.J., in *Ex parte Pannell* (2). In *Ex parte Smith* (3) Hopwood & Co. alleged that Collie, who subsequently became bankrupt, had bought goods of them by the authority of Smith, Wood, & Co., and sued Smith, Wood, & Co., for the price, who brought in the trustee of Collie as a third party; and James and Mellish, L.JJ., held that the Court of Bankruptcy had no jurisdiction to try the question between Hopwood & Son and Smith, Wood, & Co. *Halliday* v. *Harris* (4) was cited by Mr. Beddall, but that case only establishes, what cannot I think be denied, that s. 72 gives to the Court of Bankruptcy jurisdiction to determine as matter of fact the expediency or necessity for entertaining and deciding any question which affects the realization and distribution of the property of the bankrupt, and that an erroneous determination as to the existence of such expediency or necessity is matter of appeal and not of prohibition. Since these cases were decided the Act of 1869 has been repealed and the Act of 1883 substituted for it, and s. 102 of the later Act contains the same provision as that in s. 72 of the Act of 1869, with the following addition: "Provided that the jurisdiction hereby given shall not be exercised by the county court for the purpose of adjudicating upon

(1) Law Rep. 9 Ch. 192, at p. 210.
(2) 6 Ch. D. 335.
(3) 2 Ch. D. 51.
(4) Law Rep. 9 C. P. 668.

any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceedings consent thereto, or the money, money's worth, or right in dispute does not, in the opinion of the judge, exceed in value two hundred pounds." In my judgment this provision cannot add anything to the jurisdiction given by the preceding words, but can at most only regulate the exercise of the jurisdiction where it exists, and the cases which I have cited as establishing the third proposition are therefore unaffected by it. The question in this case does not, in my judgment, arise in the bankruptcy within the meaning of s. 102, nor is it necessary to decide it for the purpose of doing complete justice or making a complete distribution of the property. The trustee does not claim any interest in the property in dispute, and although the decision of this question between Mr. Beesty and Messrs. Glyn & Co. will determine which of them is to prove in the bankruptcy in respect of the value of these skins, just as the decision of the question in *Ex parte Smith* (1) determined which party was to prove in the bankruptcy for the value of the goods sold by Hopwood & Son, yet in my judgment that is not such a question as is referred to in s. 102. It might with as much reason be said that if a creditor made a claim upon a surety for the bankrupt, and the surety alleged that he had been discharged by, for instance, time having been given to the bankrupt, the Court of Bankruptcy had authority to decide that question, because the result would determine whether the creditor or the surety should be the person to prove against the estate of the bankrupt.

The motion must be refused, but without prejudice to any action that Mr. Beesty may be advised to bring against Messrs. Glyn & Co., and, under the circumstances, I think there should be no order as to costs. The official receiver will take his costs out of the estate.

Motion refused without costs.

Solicitors for Mr. Beesty: *Stevens, Bawtree, & Stevens.*
Solicitors for the Bank: *Murray, Hutchins & Stirling.*
Solicitors for the Official Receiver: *W. W. Aldridge.*

(1) 2 Ch. D. 51.

H. L. F.

1884

June 18.

EX PARTE WEMYSS. IN RE WEMYSS.

Bankruptcy—Petition by Debtor—Receiving Order—Payment of Creditors in full—Power to rescind Order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 5, 8, 104.

A debtor presented a bankruptcy petition and a receiving order was made. The debtor's father, who was a partly secured creditor, immediately afterwards paid all the unsecured creditors in full. The only other creditor was fully secured. The debtor then applied to the Court to rescind the receiving order and to allow him to withdraw his petition. The application was assented to by the fully secured creditor and by the father. The judge held that he had no jurisdiction to rescind the order, but he made an order staying all further proceedings under the order :—

Held, that there was jurisdiction to grant the application.

APPEAL from the Birkenhead County Court.

David Wemyss filed a bankruptcy petition in the Birkenhead County Court on the 5th of May, 1884, and a receiving order was at once made. The debtor was then indebted to unsecured creditors in the sum of 710*l.* 5*s.* 4*d.* He was also indebted to the executors of D. H. Collins in the sum of 800*l.*, which was secured by a first mortgage of freehold property of the value of 1200*l.* He also owed his father 1844*l.*, of which 500*l.* was secured by a second mortgage of the same property. Two days after the filing of the petition the debtor's father paid all the other unsecured creditors in full, and the debtor then applied to the Court for an order to rescind the receiving order and to permit the withdrawal of the petition. The application was consented to by the executors of Collins and by the debtor's father. The judge required the debtor to file a statement of his affairs and this was accordingly done. The official receiver examined the debtor's vouchers and expressed himself satisfied, and he stated that there appeared to him to be no objection to the application arising out of the statement of affairs or out of the debtor's conduct. The judge was of opinion that he had no jurisdiction under the Act to allow the withdrawal of the petition or to rescind the receiving order, but he made an order that all further proceedings under the receiving order should be stayed.

The debtor appealed.

J. E. Linklater, for the appellant. Sect. 104 of the Bankruptcy Act, 1883, enables any Court having jurisdiction in bankruptcy to rescind any order made by it under its bankruptcy jurisdiction. If an adjudication had been made and it had been proved to the satisfaction of the Court that the debts of the bankrupt had been paid in full, there would have been jurisdiction under s. 35 to annul the adjudication. Is it necessary to have an adjudication made merely for the purpose of having it annulled? There must be jurisdiction under the circumstances to discharge the receiving order.

The official receiver was served, but did not appear.

MATHEW, J:—There really can be no doubt whatever about this, and we ought not to be asked to give any reasons. It is perfectly clear that there is jurisdiction to discharge the receiving order. The Act presents no difficulty whatever, and we need not go through the form of construing it.

CAVE and DAY, JJ., concurred.

Solicitors: *Pritchard, Englefield & Co., for Bleakley & Co. Birkenhead.*

W. L. C.

1884
May 21.

LIMPUS AND ANOTHER *v.* ARNOLD.

Will, Construction of—Advance by Parent to Child—Debt due to Testator, whether released by Will—Bequest of Residue on Trust to pay Income to to Widow, and subject thereto for equal Distribution among Children—Clause providing that Advances made to Children shall be brought into Hotchpot.

A testator had advanced by way of loan to the defendant, one of his children, a sum of 2000*l.*, upon which sum interest was paid during the testator's lifetime. The testator, by his will, devised and bequeathed all his property, both real and personal, to trustees on trust to permit his widow to receive the income actually produced by such property, howsoever constituted or invested, during widowhood, and subject thereto on trust for his child, if only one, or all his children equally if more than one, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry. The will contained a proviso that any advances made by the testator to any child or to the husband of any child in his lifetime together with interest on such advances, as charged against such child or her husband in his private memorandum book in his own handwriting, should, according to the amount thereof, be taken in full or in part satisfaction of his or her share in the testator's property unless the testator should otherwise declare by writing under his hand. The sum advanced to the defendant was charged against him in the testator's memorandum book, and such book contained an entry as follows: "This is the memorandum book named in my will as containing the advances made by me to my children or their husbands to be taken in satisfaction of their respective shares in my estate":—

Held, that the testator's widow was entitled to receive from the defendant during her life, as part of the annual income given to her by the will, interest on the said sum of 2000*l.*

SPECIAL CASE stated under Order XXXIV., rule 1, for the decision of certain questions of law arising upon the construction of the will of Robert Arnold, deceased. The facts were in substance as follows:—

The plaintiffs were the executors of the will of Jane Arnold, the widow of Robert Arnold, and they claimed in the action a sum of 293*l.*, being interest at 5 per cent. per annum from the death of Robert Arnold to the death of Jane Arnold on a sum of 2000*l.* which had been advanced by Robert Arnold to his son, the defendant, and the point in dispute was, whether Jane Arnold

was during her life entitled under the will of Robert to interest on the said sum.

On the 1st of January, 1862, the defendant was indebted to his father, the testator, in a sum of 2500*l.*, which was then secured by a promissory note for that sum payable on demand, with 5 per cent. interest per annum. In or before January, 1869, the sum due on the promissory note had become reduced by payments on account to 1600*l.* The testator kept a memorandum book in his own handwriting (being the memorandum book referred to in his will), in which he made entries relating to his rents and advances made by him to the defendant and others, including an advance to Henry Jackson, his son-in-law, who on the 26th of February, 1870, was indebted to the testator in a sum of 1140*l.*, for which he also gave a promissory note payable on demand, with 5 per cent. interest per annum. Copies of the entries in the book were annexed to the case, and the entries were admitted to be correct. They were in the form of a regular debtor and creditor account, balanced from time to time, giving the amount of principal and interest from time to time due to the testator on the debit side, and crediting the defendant with certain payments made by him from time to time on account of principal, and with payments of the interest from time to time accruing due up to the testator's death. The sum due to the testator at the time of his death from the defendant for principal was in fact 2000*l.*, the sum appearing in the book, further sums having been advanced since 1869.

On one page of the book was the following entry:—

1873, December 20th. "This is the memorandum book named in my will as containing the advances made by me to my children or their husbands to be taken in satisfaction of their respective shares in my estate." The two promissory notes were on Robert Arnold's death found in the pocket of the memorandum book.

Robert Arnold died on the 2nd of December, 1879, having duly made his will bearing date the 20th of December, 1873.

The will of Robert Arnold was, so far as material, as follows:— He devised all the real estate and bequeathed all the residue of the personal estate which might belong to him at the time of

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his death, and which was thereinafter comprised under the denomination of his "trust property," to three trustees, of whom Robert William Arnold was one. He directed that his real trust property should be sold, and the produce invested pursuant to the investment clause thereinafter contained. He directed that his trustees should convert his personal trust property not consisting of moneys invested in stocks, funds, or securities yielding income other than personal securities, and should at their discretion either get in the moneys invested as last aforesaid, or permit the same to continue so invested, and should invest the produce of the trust property so converted or gotten in pursuant to the investment clause. He directed that his trustees should permit his wife, she continuing his widow, to receive from his death the net annual income actually produced by his trust property, however constituted or invested, and that subject to the preceding directions his trustees should hold his trust property for the absolute use of his child, if only one, or all his children equally, if more than one, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry. The will contained the following proviso:—"Provided always, and I declare, that any advances made by me to any child, or the husband of any child, in my lifetime, together with interest on such advances from the time of making thereof, as charged against such child or her husband in my private memorandum book in my own handwriting, shall, according to the amount thereof, be taken in full or in part satisfaction of his or her share in my trust property unless I shall otherwise declare by writing under my hand."

Jane Arnold survived the testator and received the income of the testator's estate other than the said 2000*l.* and the advances to Jackson, but she did not receive any interest on those amounts. She died in 1882, leaving a will, by which she bequeathed to the plaintiffs, on certain trusts, her personalty, "including any sums of money or interest due and remaining unpaid at my decease from Robert William Arnold and Henry Jackson under the will of my late husband Robert Arnold."

The question for the Court was whether, on the true construc-

tion of the will of Robert Arnold, Jane Arnold was entitled to receive during her life, as part of the annual income given to her by his will, interest on the said sum of 2000*l.*, or whether interest on the said sum ceased to be payable by the defendant on the death of his father.

Channell, for the plaintiffs. The 2000*l.* was clearly a debt due to the testator at his death. The question is, when by the terms of the will that debt became released. There is nothing to shew any intention that the debt should be released during the lifetime of the testator's widow.

Warr, for the defendant. The effect of the proviso, which treats the debt due from the defendant as an advancement by a parent of a child, and provides that such advances shall be brought into hotchpot, is to release the debt as from the death of the testator. The executors could not have sued for and recovered the principal consistently with the provisions of the will, because it is treated as an advance to be brought into hotchpot. If that be so, by what machinery could the interest be recovered, if not paid during the lifetime of the widow? It is clear that the testator never meant that the principal should be a debt after his death. If the principal debt is gone, how can the interest continue? He cited *Meinertzhagen* v. *Walters* (1); *Stewart* v. *Stewart* (2); *Gilbert* v. *Wetherell* (3); *Auster* v. *Powell* (4).

Channell, in reply. The executors could have sued for the interest if called upon to do so by the widow. The whole question turns on the intention of the testator as expressed in the will. Did the testator mean that his widow should be deprived of the interest which had formed part of his income during his lifetime, and that the distribution between his children should be anticipated so far as this sum is concerned? The result would be inequality among the children, whereas the intention of the will is to preserve equality. It may well be that the testator contemplated that the principal should not be called in, and yet that the amount should remain a debt for the purpose of bearing

(1) Law Rep. 7 Ch. 670.
(2) 15 Ch. D. 539.
(3) 2 S. & S. 254.
(4) 1 De G. J. & S. 99.

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interest until the period of distribution of the residue among his children arrived.

STEPHEN, J. Having given this case the best consideration I can, I come to the conclusion that we should answer the question submitted in favour of the plaintiffs, but I must confess that, speaking for myself, I feel but little satisfaction in any conclusion that I may arrive at with regard to the intention of the testator upon the language of a will in a case like the present; for one feels that one is obliged to attribute to the testator an intention on a subject which very possibly was not present to his mind at all. Two views were put before us. I will first state the view which upon the whole commends itself to me as the true view. The general scope of the will is that the residue is to be vested in trustees on trust to pay the income to the widow during widowhood, and subject to that provision to distribute it in equal shares among the children. Then there comes what has been called the hotchpot clause. It was said on behalf of the plaintiffs that the effect of the will was that the money advanced which remained a debt during the husband's life was during the life of the widow to remain due from the son; that, though it might not have been in the contemplation of the testator that payment of the principal should be exacted from the son, yet his intention was that the interest should be paid thereon, and should form part of the income of the trust estate to be paid to the widow for her life; and that, when her interest had determined and the residue was distributable among the children, then the hotchpot clause came into effect, and the child to whom there had been an advance might either take the advance in satisfaction of his share or bring it into account. It was said in support of that view, that there was no indication that the husband did not mean his widow to have the interest on the sum due on the promissory note in his life, and that, if the defendant were to be relieved from the payment of interest on the testator's death, the result would be to defeat the intention clearly manifested in the will that there should be complete equality among the children. The view relied upon for the defendant is this: it is contended that the effect of the hotchpot

clause is that the debt, which remained a debt during the lifetime of the testator, became on the death of the testator converted into an advance, the result being that at that time the defendant became entitled absolutely to the amount of the debt and to retain it and the interest thereof till the death of the mother when the hotchpot clause came into effect, which provided that he should take the amount of the advance in satisfaction in whole or in part of his share. Many cases were cited for the defendant to shew that that was the meaning. It has always seemed to me with regard to the interpretation of wills, that unless the wills to be interpreted possess a degree of similarity, which in most cases they do not, it is difficult to make one case an authority for another. To my mind the crucial question in this case is, whether the clause relating to advances was meant to take effect at the death of the testator or the death of the widow. Looking at the will as a whole, and considering the apparent intention that the widow should during her life take the income of the whole of the testator's property as he enjoyed it in his life, and that there should be perfect equality between the children, it seems to me that the intention was that the interest on the sum due from the defendant should continue payable during the widow's life, and therefore that the questions put should be answered in favour of the plaintiffs.

MATHEW, J. I am of the same opinion. It is argued that the effect of the will is that the defendant was at the testator's death released from the debt which he owed to the testator during his lifetime. The consequence would be that at that period he would to the extent of 2000*l.*, receive his share of the residue; and the widow would lose, and he thenceforward would have, the benefit of the interest which he otherwise must have paid up to the death of the widow. We have to see whether upon the will taken as a whole there appears to have been an intention that he should be treated differently from the rest of the children, and that the period when the interest of the children generally was to become vested in possession should thus be anticipated in his favour. At the time when the testator made his will he was dealing with a sum upon which interest was

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being paid him, and upon that sum interest continued to be paid him till long afterwards. The will provides that the wife shall receive the income of the trust property, however constituted and invested. From that provision, if and so far as it stood unqualified by any other provision in the will, an intention plainly would appear that the wife should be placed in the same position as he had been in with regard to the income derived from his property. He then provides that, subject to the preceding directions, his trustees should hold his trust property in trust for all his children (if more than one) equally. So far the intention expressly indicated is that there shall be complete equality among the children, whereas if the construction contended for by the defendant is applied that intention is not carried out. Then follows the provision that the sums advanced to any child in his lifetime should be taken in full or in part satisfaction of that child's share. It seems to me that, giving effect to the whole, the meaning of the testator was that, subject to the direction for payment of the income of his property to his wife for life, it should be distributed equally among his children, and that upon making such distribution any advances made to children and still unpaid should be taken into account. This construction preserves the equality among the children contemplated by the earlier portions of the will.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *E. & F. Bannister.*
Solicitors for defendant: *Park Nelson, Morgan, & Gemmell.*

E. L.

THE QUEEN *v.* HASLEHURST.

1884
June 10.

Poor Law—Poor-rates, Application of—Power to pay Roman Catholic Clergyman for Ministrations in Workhouse—Auditor—Disallowance.

By a general order of the Poor Law Board, dated the 19th of August, 1867, it was provided that the guardians might employ such persons as they should deem requisite in or about the workhouse, or workhouse premises, or on the land occupied for the employment of the pauper inmates of the workhouse, or otherwise in or about the relief of the indoor poor, upon such terms and conditions as should appear to them to be suitable:—

Held, that, under this order it was competent to the guardians to appoint and pay a Roman Catholic clergyman to minister to the religious wants of the Roman Catholic inmates of the workhouse.

MOTION for a writ of certiorari to bring up the disallowance by a poor law auditor of certain payments made out of the poor-rates of the parish of Liverpool, for the purpose of quashing such disallowance. The facts appeared to be as follows: The select vestry of the parish of Liverpool had passed resolutions that payment at the rate of 150*l.* per annum should be made to a certain Roman Catholic clergyman during the pleasure of the vestry for services rendered to the Roman Catholic inmates of the workhouse, and that payment at the rate of 75*l.* per annum should be made during the pleasure of the vestry to another Roman Catholic clergyman for services rendered to the Roman Catholic inmates of the industrial schools in connection with the workhouse. These resolutions were communicated to the Local Government Board for their approval, and that Board answered stating that with regard to the inmates of the workhouse it was competent to the select vestry without the approval of the Local Government Board, under the provisions of the general order of the 19th of August, 1867, to employ such persons in connection with the relief of the indoor poor in the workhouse as they should deem requisite upon such terms and conditions as should appear to them to be suitable; and that with regard to the schools the Board, in pursuance of the provisions of art. 51 of the order of the Poor Law Board of the 7th of August, 1856, assented to the proposal to employ a religious instructor for the Roman Catholic

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children with a salary at the rate of 75*l.* per annum for his services.

From the date of the resolutions payment had been made to the gentlemen named therein after the rates thereby specified for the religious services rendered by them to the Roman Catholic inmates of the workhouse and of the industrial schools. At the audit of the accounts of the parish, held in August, 1883, the auditor disallowed certain payments so made, and surcharged therewith a member of the select vestry who had signed the cheques for such payments. (1)

French (*Charles Russell, Q.C.*, with him), moved for a certiorari. The disallowance was wrong. By 4 & 5 Wm. 4, c. 76, s. 19, it is provided that no inmate of a workhouse shall be compelled to attend services contrary to his religious belief, and a licensed minister of the religious persuasion to which any inmate belongs is authorized to visit the workhouse to afford him religious assistance. By s. 46 it is provided that the Poor Law Commissioners

(1) By an order of the Poor Law Commissioners, dated the 27th of April, 1843, relating to the parish of Liverpool, it was provided in substance as follows: (Art. 60) that the select vestry should from time to time appoint certain officers, that is to say, a master of the workhouse, a matron of the workhouse, a chaplain, a schoolmaster, a schoolmistress, a medical officer for the workhouse, a porter; and also such assistants and servants as should be necessary for the efficient performance of the duties of the said several officers; and (art. 61) that the officers so appointed should respectively perform such duties as thereinafter set forth. By art. 76 it was provided that it should be the duty of the chaplain, among other things, to read prayers and preach a sermon to the paupers and other inmates on every Sunday, unless the select vestry, with the consent of the Poor Law Commissioners, should otherwise direct, and to read prayers to them on Good Friday and Christmas Day; and to examine the children and catechize such as belonged to the Church of England at least once in every month.

By the general order of the Poor Law Board, dated the 19th of August, 1867, which applied to the parish of Liverpool, among other parishes and unions, it was provided (art. 1) that the guardians (which term by the interpretation clause included the select vestry) might employ such persons as they should deem requisite in or about the workhouse or workhouse premises, or on the land occupied for the employment of the pauper inmates of the workhouse, or otherwise in or about the relief of the indoor poor, upon such terms and conditions as should appear to them to be suitable.

may direct the appointment of paid officers by the parish or union authorities for the purposes of the relief of the poor, and by s. 109 the word "officer" includes "clergyman." A clergyman is any person in holy orders, and a Roman Catholic clergyman is therefore within the meaning of the term "officer." In any case the terms of the order of 1867, art. 1, are large enough to include the appointment of such a clergyman to minister to the religious wants of the Roman Catholic inmates of the workhouse.

[He cited *Reg.* v. *Braintree* (1): the order of the Poor Law Commissioners of 1843, arts. 60, 61, 76: and 31 & 32 Vict. c. 122, s. 21.]

Sir Hardinge Giffard, Q.C., and *Clement Higgins*, shewed cause. It is not denied that a Roman Catholic clergyman is a clergyman within the ordinary meaning of the term, but the question is in what sense the term is used in the Poor Law Amendment Act, 1834. It is contended that the "clergyman" there meant is a clergyman of the established church. It is also clear that the chaplain or assistant chaplain contemplated by the order of 1843 is a Church of England chaplain, for it is provided that it shall be his duty to catechize the children belonging to the Church of England. The terms of art. 1 of the order of 1867 were intended to give a general power of appointing and paying persons to be employed in subordinate capacities about the workhouse and otherwise for the purposes of the relief of the poor, but they are not appropriate, and could not have been intended to apply, to the appointment of ministers of religion, a matter which would have been expressly provided for, if intended to be dealt with. The disallowance was therefore right.

STEPHEN, J. This case has been fully argued, and in the result I do not feel much difficulty in arriving at the conclusion that the writ of certiorari should be granted. But as the case is of some importance I will discuss the various enactments that have been referred to. It is impossible not to feel some satisfaction in coming to the conclusion at which we have arrived, because it is obvious that, if religious ministrations are rendered

(1) 1 Q. B. 130.

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to the inmates of workhouses, it is more desirable that they should be rendered by persons in a recognised position appointed by and responsible to the guardians, than that they should be rendered by mere volunteers. The first enactment which was referred to was the 19th section of the Poor Law Amendment Act, 1834, 4 & 5 Wm. 4, c. 76, which in substance provided that no rules or orders of the Poor Law Commissioners should oblige any inmate of any workhouse to attend any religious service contrary to his religious principles, and that it should be lawful for any licensed minister of the religious persuasion of any inmate to visit the workhouse for the purpose of affording religious assistance to such inmate and instructing his child or children in the principles of their religion. I agree that the provisions of this section appear to point to what we know to be the fact, viz., that the clergyman of the Church of England as chaplain had a superior position in the workhouse, and that the intention of this section was to exempt those of a different religious persuasion from being obliged to submit to his ministrations.

Then by s. 46 of the same Act the Poor Law Commissioners were empowered to direct the overseers or guardians to appoint paid officers for superintending or assisting in the administration of the relief and employment of the poor, and for the examining and auditing, allowing or disallowing, of accounts in the parish or union, and otherwise carrying the provisions of this Act into execution. And by s. 109, the interpretation clause, "officer" includes "clergyman." The provisions of these sections were made the subject of judicial decision in *Reg.* v. *Braintree* (1), in which case it was held that the Poor Law Commissioners had power under the 46th section to direct the appointment of a chaplain. That decision has some importance in relation to the present case, inasmuch as it was a decision that the general words used in s. 46 were to be construed as including the appointment of ministers of religion. The next important matter is the order of the Poor Law Commissioners of 1843. Article 60 of that order provides that the select vestry shall appoint certain officers, including a chaplain, and article 76 defines the duties of the chaplain. I agree with the interpretation put on that order by

(1) 1 Q. B. 130.

the counsel for the auditor. I think that the chaplain there intended must be a clergyman of the Church of England. But then we come to the order of 1867. The 1st article of that order provides that the guardians (which term includes a select vestry) may employ such persons as they deem requisite in or about the workhouse or workhouse premises, or on the land occupied for the employment of the pauper inmates of the workhouse, or otherwise in or about the relief of the indoor poor, upon such terms and conditions as appear to them suitable. It seems to me that the case before us really turns on that order, and the question involved is whether its terms authorize the appointment of a Roman Catholic clergyman, not to the position of the chaplain of the workhouse, or to perform the specific duties of a chaplain under the order of the Poor Law Commissioners, but to perform towards the Roman Catholic inmates duties in many respects similar to those performed by the chaplain towards the Church of England inmates. It appears to me clear that they do. The terms of the order are perfectly general, and, though probably the appointments principally contemplated by the order are of a class of persons inferior to clergymen, there is really nothing in the language used to restrict the character of the persons who may be appointed. I am disposed to think it not improbable that the poor law authorities may have intended under the cover of general language to deal with a matter without attracting attention, which, if more specifically dealt with, was likely to excite a good deal of feeling and discussion. There are certain things in the order which give colour to this supposition. In article 3 it is provided that the foregoing articles of the order (except so much thereof as relates to their quarterly or other periodical payments) shall not apply to the following officers or persons, that is to say, (among others) the chaplain.

But for this provision it therefore seems to have been supposed that the 1st article might apply to Church of England chaplains. That being so, why should I suppose that it does not apply to what I may call for this purpose Nonconformist chaplains? The matter does not stop there. There is another consideration which leads me to think that the Poor Law Board may have intended to give the power to make these appointments by the

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order of 1867. By the 21st section of the Poor Law Amendment Act of 1868, 31 & 32 Vict. c. 122, which was passed in the following year, and which was no doubt drawn by persons familiar with the provisions of the order of 1867, it is provided that every inmate for whom a religious service according to his own creed shall not be provided in the workhouse shall be permitted, subject to certain regulations, to attend, at such times as the said board shall allow, some place of worship of his own denomination within a convenient distance of the said workhouse, if there be such in the opinion of the board. This section seems to me to contemplate that at that time it was lawful for the guardians to provide such religious services within the workhouse. How could they do so unless they had power to appoint and pay persons for the purpose of holding such services? If my interpretation of the order of 1867 is right, there was such power. This appears to have been the view taken by the Local Government Board itself in this very case. Taking all these considerations together, it seems to me that the true construction of the order of 1867 is that it gave the select vestry power to make these appointments, and to pay the persons thereby appointed. I come, therefore, to the conclusion that the disallowance by the auditor of these payments was wrong, and the writ of certiorari must issue.

WATKIN WILLIAMS, J., concurred.

Rule absolute.

Solicitors for applicant: *W. W. Wynne & Son, for T. J. Smith.*

Solicitors for auditor: *Kennedy, Hughes, & Kennedy.*

E. L.

[IN THE COURT OF APPEAL.]

1884
June 24.

GRIFFITHS *v.* THE LONDON AND ST. KATHARINE DOCKS COMPANY.

Negligence—Master and Servant—Unsafe Premises—Knowledge of Master—Ignorance of Servant.

In an action of negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew, but that the servant was ignorant of the danger.

Judgment of the Queen's Bench Division (12 Q. B. D. 493) affirmed.

APPEAL by the plaintiff from the judgment of the Queen's Bench Division giving judgment for the defendants on the ground that the statement of claim was void and shewed no cause of action. The statement of claim is fully set out in the report before the Queen's Bench Division (1). It alleged that one of the iron doors which formed part of the warehouses of the dock belonging to the defendants gave way and fell upon the plaintiff who was in the defendants' employment. It contained no allegation that the plaintiff was ignorant of the insecure condition of the door, or of the danger to which he was exposed, but only alleged that the defendant company "knew or ought to have known of the defective, unsafe and insecure condition of this iron door, and that it was altogether owing to the negligence of the defendant company that the same was not put into a safe and secure condition."

Fillan, for the plaintiff. It is not necessary that the statement of claim should contain an averment of ignorance of the plaintiff of the danger, and should so negative that which was matter of defence: *Watling* v. *Oastler* (2), where in an action for an injury causing death to a servant whilst at work for his master on defective machinery, the declaration was held to disclose a cause of action although there was no allegation that the servant was ignorant of the defect and Martin, B., during the argument said, "surely that fact," viz., the knowledge of the servant, "would be

(1) 12 Q. B. D. 493. (2) Law Rep. 6 Ex. 73.

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matter of defence." It is not necessary to allege in terms that the deceased was ignorant of the danger.

[BOWEN, L.J. The judgments of Kelly, C.B., and Martin, B., shew that the ignorance of the servant in that case was to be inferred from the averment in the declaration there, "by reason of the premises" which involved such ignorance. Here there is no such allegation, nor any allegation that the accident happened by the mere negligence of the defendants.]

In *Williams* v. *Clough* (1), Martin, B., said, "it was not necessary that the declaration should negative every possible state of facts which might afford a defence."

Gorell Barnes, for defendants, was not heard.

BRETT, M.R. The question is whether a primâ facie cause of action is shewn in the statement of claim in this action. Now where it is an action by a servant against his master for the wrongful condition of machinery on the premises on which the servant is to act, or of the condition of the means by which the services of the servant are to be fulfilled, if the servant confines the allegations in his statement of claim to alleging the existence of danger in any of these things, owing to the negligence of the master, he shews no cause of action. That was decided many years ago by *Priestley* v. *Fowler* (2). If the danger is one which was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action, and as it is necessary that these two things should exist in order to form a primâ facie cause of action, it is necessary that they should be shewn to exist in the statement of claim. It has been contended that what Martin, B., said in *Watling* v. *Oastler* (3), conflicts with this view of the law, but in truth it does not do so, because there these two propositions were inferred from the allegation in the declaration in that case. The other case which was cited, namely, *Williams* v. *Clough* (1), is dead in point against what Mr. Fillan has contended for, because not only did the Court there hold that it was necessary there should be an allegation of a defective state of machinery which was known to the master, but not known to the servant, but

(1) 3 H. & N. 258. (2) 3 M. & W. 1. (3) Law Rep. 6 Ex. 73.

Bramwell, B., suggested that more ought to have been shewn to make the declaration good, and that it ought to have been shewn that the servant had not the means of knowing that the machinery was unsafe, and it was upon this point only that the other members of the Court differed from him. I am of opinion that the decision of the Divisional Court in the present case was right on the ground on which it was put, and that this appeal must therefore be dismissed.

BOWEN, L.J. I am of the same opinion. The old form of declaration used to shew that the danger which caused the accident was known to the master and unknown to the servant. Both these allegations are material, because without them there is no cause of action, and unless it was proved at the trial directly, or that there were facts from which it might be inferred, that the servant was ignorant of the existence of the danger he would be non-suited. For the plaintiff it was contended that his knowledge was a mere matter of defence, and that it should so appear as a matter of pleading, but that is not true, for the old form of declaration as I have already pointed out must have shewn ignorance on the part of the servant. The observations of Martin, B., and Kelly, C.B., in *Watling* v. *Oastler* (1), have been relied on as shewing a declaration to be good without an express averment of ignorance of the servant, but those learned judges considered such averment not to be required, because there a cause of action was shewn by reason of there being in the declaration other averments which the statement of claim in the present case has not got, nor anything like them.

FRY, L.J. I am of the same opinion. It appears to me to be plain that the knowledge of the master and the ignorance of the servant are necessary to form the cause of action.

Appeal dismissed. (2)

Solicitors for plaintiff: *Bordman & Co.*

Solicitor for defendants: *W. M. Hacon.*

(1) Law Rep. 6 Ex. 73.

(2) Leave was given to the plaintiff to amend his statement of claim on the usual terms.

1884
April 23.

[IN THE COURT OF APPEAL.]

JONES *v.* CURLING AND ANOTHER.

Practice—Costs—Trial by Jury—Order LXV., r. 1—Jurisdiction of Judge to make Order as to Costs—"Good Cause"—Appeal—Action for Recovery of Land—Separate Issues—Taxation of Costs in such Action.

Where an action is tried with a jury the judge before whom it is tried has no jurisdiction under Order LXV., rule 1, to make an order by which the costs will not follow the event unless there exist "good cause" within the meaning of that rule, and consequently there is an appeal with respect to the existence of the facts necessary to give the judge jurisdiction to make such order.

To be "good cause" within that rule there must be facts shewing that it would be more just not to allow the costs to follow the event, as for example, oppression or misconduct of either of the parties by which costs have been unnecessarily increased.

The fact that the action is for the recovery of several closes of land, that the only defence is that the defendant is in possession, and that the verdict is for the plaintiff for some only of the closes claimed, does not by itself constitute "good cause" within Order LXV., rule 1, since the verdict in such a case is distributive, and the costs, if properly taxed, would be as on a finding by the jury on separate issues.

ACTION to recover six closes or parcels of land in the parish of Guilsfield, in the county of Montgomery. The defendants, availing themselves of Order XIX., rule 15 (which corresponds with Order XXI., rule 21, of the new rules of 1883), relied for their defence on their being in the possession of the hereditaments claimed. The trial took place at Chester in February, 1883, before Lord Coleridge, C.J., and a jury, when it appeared that John Jones, the grandfather of the plaintiff, being seised in fee of several messuages and hereditaments in the parish of Guilsfield in the county of Montgomery to which he had become entitled under the will of his father, made a settlement in November, 1827, on his marriage with Mary Francis, by which he settled two farms called Pant Farm and Stonehouse, both in the said parish of Guilsford, to the use of himself for life, with remainder to the said Mary for life, with remainder to his first and other sons in tail. The plaintiff's right to possession under this settlement accrued only in 1878, and the present action was commenced in 1882 when he was still a minor.

The property settled was described in the deed of settlement only generally by the names of the farms with the names of the occupying tenants, but without any quantities being stated, or anything by which the lands occupied by the tenants of these farms in 1827 could be identified, and it was rendered more difficult to ascertain the property comprised in the settlement by reason of John Jones, the settlor, having got afterwards into pecuniary difficulties and so mortgaged and dealt with all the land in his possession that the land claimed in this action as part of the land to which the Plaintiff was entitled as heir in tail under the settlement of 1827 had been purchased bonâ fide by Mr. Curling, under whom the defendants claimed, from persons to whom it had been mortgaged by the said John Jones.

The result of the action was that the jury found a verdict for the plaintiff for four of the closes claimed, and described at the trial as Nos. 1, 2, 3, and 5, and for the defendants for the other two described as Nos. 4 and 6, and the Lord Chief Justice directed judgment to be entered for the plaintiff for the premises Nos. 1, 2, 3, and 5, and for the defendants for the premises Nos. 4 and 6. The quantity of the land and premises which the jury found for the plaintiff was 81*a.* 0*r.* 9*p.*, and the quantity which they found for the defendants was 80*a.* 2*r.* 19*p.*, and the value of what they so found for the plaintiff was estimated at 4950*l.* The Lord Chief Justice thereupon made an order that the costs of both parties should be taxed, added together, and divided.

The plaintiff appealed from this order.

Sir H. Giffard, Q.C., and *McIntyre, Q.C.* (*W. H. Clay*, with them), for the plaintiff. Where an action is tried with a jury the judge at the trial has not a mere discretionary power over the costs, but since by Order LXV., rule 1 (1) the costs are to follow

(1) Order XLV., rule 1: "Subject to the provisions of the Acts and these rules the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge. . . . Provided also, that where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event unless the judge by whom such action, cause, matter or issue is tried, or the Court, shall, for good cause, otherwise order."

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the event, unless "for good cause" the judge shall order otherwise, there must be some good cause to give the judge jurisdiction to make any such order, and consequently where no good cause exists an appeal lies. In *Myers* v. *Defries* (1) the Divisional Court was held to have an original jurisdiction to make an order under the old rule of Order LV., which corresponds in this respect with the present rule of Order LXV., rule 1. What then is the event within the meaning of that rule?

[BOWEN, L.J. Whatever is such event, it is clear that the order of the Lord Chief Justice prevents the costs from following the event.

BRETT, M.R. If this Court should be of opinion that there existed "good cause" within the meaning of the rule it would not interfere with the mode in which the Lord Chief Justice exercised his power over the costs.]

That must be admitted. But the mere fact that under the circumstances of such a case as the present one, in which it was very difficult to know what was comprised within the settled property, the plaintiff claimed to be entitled to more land than the jury found he had a right to, was not a good cause to justify a judge preventing the costs following the event.

[BRETT, M.R., referred to *Collins* v. *Welch*. (2)]

That was an action which ought not to have been brought in the Superior Court, and the bringing it there was oppressive, and therefore "good cause" why the judge should make the order. In the present case it would be more just that the ordinary rule that the costs should follow the event should prevail than that the plaintiff should have only half the costs of both parties.

Sir F. Herschell, S.G., and *Horne Payne*, for the defendants. No appeal lies from the order which was made in this case, it being an order as to costs left to the discretion of the judge at the trial: Judicature Act, 1873, s. 49. In *Marsden* v. *Lancashire and Yorkshire Ry. Co.* (3) it was considered an open question whether an appeal would lie from a judge's order as to costs made under the old rule, Order LV., which in this respect corresponds with the present rule, Order LXV., rule 1. In that case

(1) 4 Ex. D. 176. (2) 5 C. P. D. 27.
(3) 7 Q. B. D. 641.

Lord Selborne, C., in his judgment said, "It is not now necessary to determine what is the 'good cause' which must be shewn; it may be that a power to appeal from the decision of the judge does exist, but at all events the onus probandi lies on the party alleging that the judge has in point of law wrongly exercised his jurisdiction." The object of the rule was to leave the costs of proceedings in the discretion of the Court or judge, and that even on a trial with a jury the judge was to have power to determine when the costs ought not to follow the event, and he was to be judge of there being good cause for ordering the costs to be otherwise than they would ordinarily be according to the event. Here there were facts which rightly influenced the Chief Justice in making the order which he made.

[BRETT, M.R. In *Cooper* v. *Whittingham* (1) Jessel, M.R., said, "As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts; for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind the rule is plain and well settled, and is as I have stated it." What the late Master of the Rolls there said, though not with reference to this Order LXV., rule 1, serves, I think, as a good indication of what is meant to be "good cause" in that rule.]

Here the plaintiff claimed not only what formed part of the settled farms, about which there was great difficulty in knowing of what they consisted, but what did not form part of them, and had been rightly in the possession of the defendants and him under whom they derived their title for very many years, and as in fact the plaintiff succeeded in recovering only about half in quantity and value of the lands he claimed, the justice of the case was met by dividing the costs of both parties as ordered by the Chief Justice.

(1) 15 Ch. D. 501, at p. 504.

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[BRETT, M.R. Can the event itself be "good cause"? As by the rule the costs are to follow the event unless the judge orders otherwise for good cause, "good cause" must surely be something extraneous to the event.]

There are no issues in ejectment, and therefore if the judge at the trial made no order as to costs, the plaintiff would have on taxation all the costs and the defendants would not have any, although according to the verdict they were entitled to half the property claimed. That is the practice of the masters on taxation. This would have been unjust in the present case, and would in itself be "good cause" for the Chief Justice making the order.

[BOWEN, L.J. Since the Judicature Act is there any reason why there should not be distributive issues in ejectment. Even before that Act *Alcock* v. *Wilshaw* (1) shews that in ejectment under the Common Law Procedure Act, 1852, where the plaintiff recovered only part of what he had claimed the verdict was distributive.

BRETT, M.R. The verdict in that case was to be "entered as in the schedule A. No. 17 of the Common Law Procedure Act, 1852, for the part only to which he was entitled with negative words that he was not entitled to the residue."]

It may be difficult to say since the Judicature Act why in an action to recover land there should not be distributive issues, but in practice there are not, and the costs are not taxed as on separate issues.

BRETT, M.R. In this case an action was brought in ejectment to recover several separate closes of land which were in the possession of the defendant. The case was tried before the Lord Chief Justice, and the jury found for the plaintiff as to some of those closes, which as nearly as possible amounted in quantity and value to about half of what the plaintiff had claimed, and for the defendant as to the residue of the closes claimed in the action. The question had depended upon whether the closes claimed had been parcels of two farms, which had been settled so long ago as 1822. The plaintiff was the remainderman under that settlement, and had not been in a position to bring his action until about the

(1) 6 Jur. (N.S.) 628.

time in which he brought it. The settlor, who was tenant for life and in possession of the whole, had taken advantage of his position and had mortgaged and dealt with parts of this settled property, so that the defendant had become bonâ fide and without knowledge of the position of the title, purchaser of and as such was in possession of the closes the subject of this action. Both the plaintiff and the defendant were in a great difficulty with regard to what were the parcels of the two farms which had been settled, and that was by reason of the way in which the tenant for life had dealt with them. The result was that the jury found as to about half the land claimed in favour of each of the parties, and the Lord Chief Justice made an order that the costs of both parties should be taxed and put together and then equally divided. It is obvious that that was not an order which left the costs to follow the event, but, on the contrary, it was one preventing the costs from following the event in accordance with the ordinary mode of taxation.

Now from this order an appeal has been brought to this Court, and the first question for us to decide is whether we can entertain any appeal, and if so to what extent? I am of opinion that this Court has a right, and is bound, to inquire whether the condition exists which gives a judge jurisdiction to make an order as to costs. The case has been tried before a judge and jury. It seems to me, according to the meaning of Order LXV., rule 1, that on the trial of an action by a jury unless there is good cause shewn the learned judge has no discretion as to costs, and that they must follow the event, that is, according to the ordinary mode of taxation; but that if there is a good cause then the judge has a discretion as to costs; and if he has, then the mode in which he exercises that discretion (unless perhaps where it has been exercised in such a way that a Court must say it is absolutely wrong) is not the subject of appeal.

Therefore the condition which gives the judge upon a trial before himself and a jury jurisdiction to make an order as to costs is, whether there was a good cause or not existing, and I am of opinion that that is a subject-matter of appeal. Whether there was a good cause or not is a question of fact, and the Court of Appeal must consider whether in their judgment that fact did

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exist, and if they disagree as to this with the judge who tried the action they must allow the appeal.

The question, therefore, is, was there in this case good cause shewn? That depends upon what is good cause under such circumstances. In *Cooper* v. *Whittingham* (1) Jessel, M.R., in a judgment not, it is true, as to Order LXV., r. 1, but as to the circumstances under which a judge has discretion with regard to the costs, even in a Chancery suit, gave, in the passage I read during the argument, that which I do not say is an exhaustive definition of what is a good cause to enable a judge to exercise any discretion at all, but that which goes a long way towards being a definition, and is very instructive. Taking that as the groundwork of what should constitute good cause within this order, it seems to me that the facts must shew the existence of something, having regard either to the conduct of the parties or to the facts of the case, which make it more just that an exceptional order should be made than that the case should be left to the ordinary course of taxation. For example, if the facts shew that there has been misconduct on the part of the plaintiff to this extent, that the fact of his bringing the action is oppressive, or that he has made an exorbitant claim by carelessness or recklessness, they would, to my mind, be such as would be a good cause for a judge interfering. So if the finding of the jury is such that if the ordinary course of taxation were followed it would make the result unjust to either of the parties, then I think that injustice itself would be a just cause which would enable the judge to make an order as to costs.

Do any of those circumstances exist in the present case, and were they before the Chief Justice so as to give him jurisdiction to exercise his discretion as to costs? Now nobody alleges that there was any misconduct on the part of the plaintiff. Was there then any recklessness or negligence which made it oppressive on his part to have brought the action for all the closes? If by ordinary examination of the title-deeds or plans, or the ordinary examination of witnesses he could have seen that he had no claim in respect of half the property which he claimed, I should think that would have made it oppressive in him and wrong to

(1) 15 Ch. D. 501.

have brought this action for all the land he claimed; but here it was argued for the defendant that this case was so difficult that neither he nor the plaintiff could tell until it came before the jury what were the rights of either of them. Therefore, as it seems to me, there was nothing like misconduct on the part of the plaintiff either to the extent of malice, or of bringing an action which he knew was unfounded, or in respect of carelessness or negligence; and if there was good cause within the definition which I have laid down, it must be on the ground that the ordinary taxation of costs must produce injustice. Now if the costs were to be taxed, as it has been said they must be taxed, as if the action were to be treated as only one issue, and the plaintiff had succeeded on that issue, and was therefore entitled to the whole costs of all the witnesses and briefs to the full extent, and nothing at all was to be allowed to the defendant, I think that would, under the circumstances, work injustice. That calls upon us to say how, in our opinion, the costs, if taxed in the ordinary way, ought to be taxed. I will consider that question both with respect to the practice as it would have been before and as it is now since the Judicature Act. I am of opinion that even before the Judicature Act (whatever may have been the practice in the masters' offices), where in ejectment claims were made for different parcels of land under separate demises, the question with regard to each was always treated as a separate issue, and if the jury found for the plaintiff on one and for the defendant on the other, the judgment was so entered, and the costs were taxed as upon findings by a jury on separate issues. Then with regard to the question whether this would be the same before the Judicature Act if the different parcels were claimed under one demise, the case of *Alcock* v. *Wilshaw* (1), which was decided in 1860, seems to me an authority for saying that even in that case if the plaintiff succeeded in respect of certain closes, and the defendant succeeded in respect of certain other closes, the verdict would be entered distributively for the plaintiff for those parcels to which he had shewn he was entitled, and for the defendant for the others; and I have no doubt if under those circumstances the costs were properly taxed they would have been taxed as upon a finding of separate issues.

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It has been suggested that the masters did not tax on that principle. If they did not, in my opinion this practice was a bad one, and a bad practice in taxing costs cannot give jurisdiction. But since the Judicature Act I have not the least doubt that the action for the recovery of land must be treated as all other actions, and that if the plaintiff claims in respect of certain closes, and the defendant in his defence does not counterclaim, but relies on the fact of his being in possession, and puts the plaintiff to the proof, separate issues are raised as to each and every part of the plaintiff's claim, although it is in form one only, so that the closes in respect of which the jury find the plaintiff claims rightly form one issue and the closes in respect of which the jury find he claims wrongly form a separate issue; and, therefore, without any further instructions to the master, the proper way of taxing the costs upon such findings is to tax the costs as if those findings were in respect of separate issues. If that be the proper mode of taxing the costs, as I hold that it is, then I can see no injustice caused by this verdict, even though the plaintiff practically succeeds as to half only, and the defendant practically succeeds as to the other half. The result is, the plaintiff will have the general costs of the cause, and the costs of such witnesses as were necessary to enforce his claim in respect of the closes on which he succeeded; and the defendant will have the costs of such witnesses as were called in respect of the closes on which he succeeded, and if the expenses of the defendant were increased by reason of the plaintiff claiming closes to which he was not entitled the defendant would be allowed such increased expenses. With respect to the briefs, that part which applied to the evidence with regard to the closes on which the plaintiff succeeded would be the plaintiff's costs; and that part which applied to the evidence as to the closes upon which the defendant succeeded would be the defendant's costs. It, therefore, seems to me there would be no injustice, and if so, there is no sufficient ground to justify a finding that in this case there was good cause for doing otherwise than allowing the costs to follow the event in the ordinary way. Under these circumstances, with great deference to the Lord Chief Justice, I think he had no jurisdiction to exercise any discretion as to costs, and to make

the order which he made. That order must be set aside and the costs be allowed to follow the event according to the ordinary rule.

BOWEN, L.J. I am of the same opinion. I think that the Lord Chief Justice in making the order which he did assumed to have a jurisdiction without there being any facts which gave him that jurisdiction. Now, in the first place, is there an appeal at all? The question of costs is dealt with by Order LXV., rule 1. That rule begins with placing in the discretion of the Court the costs of all proceedings in the court, but then follows a provision by which in the event of a jury trial the costs are removed from the discretion of the judge and are to follow the event, except in one case, which is, if the judge shall for good cause otherwise order. It appears to me that these latter words restore costs to the discretion of the judge, provided a condition precedent is fulfilled; that is to say, provided there is good cause. But unless there are facts from which a reasonable man might think the exceptional order was one which was more just than allowing the costs to take the ordinary course, there can be no good cause, and if there is no good cause then the judge had no jurisdiction. It seems to me that on the true construction of this rule there is an appeal with respect to the existence of the facts upon which alone the jurisdiction of the judge depends. When, however, this jurisdiction is established, then I think there is no appeal unless the judge's discretion is exercised in such a wrong way as to make it no reasonable exercise of discretion at all; but it is not necessary to define the limits within which an appeal would lie in that case, because it is sufficient to hold here that, at all events, the existence of facts which give the judge jurisdiction are matters which this Court can inquire into. That being so, and it being open for us to decide whether there was good cause here for making the exceptional order by which the costs do not follow the event, we are driven to consider what is good cause within the meaning of this rule. Now I have always entertained the strongest opinion that the Court would be acting ultrà vires if it were to lay down a hard and fast line upon which discretion should be exercised when

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the Act of Parliament or Judicature rule which creates the discretion gives it in ample and unqualified terms. And the view which the Master of the Rolls has put forward of this Order LXV., rule 1, has to my mind the merit that it does not do this, but leaves the matter nearly as the rule itself does. What he has given is not so much a definition as an illustration of the meaning of the rule. It is an attempt to put into other words, but words as wide, the language of the rule, with a view not to limiting or defining it, but of expressing what we understand it to mean. The object, of course, is that justice should be done. It was felt by the legislature that justice would best be done in jury trials by leaving the costs to follow the event, but that there might be exceptional cases in which that rule would work injustice, and then that the judge should in furtherance of justice be allowed to make an exceptional order. So "good cause" really seems to me to mean that there must exist facts which might reasonably lead the judge to think that the rule of the costs following the event would not produce justice as complete as the exceptional order which he himself could make. Now, to ascertain the existence of such facts the judge should look in the first place at the result of the action itself, namely, the verdict of the jury, and he should look also at the conduct of the parties to see whether either of them had in any way involved the other unnecessarily in the expense of litigation, and beyond that he should consider all the facts of the case so far as no particular fact was concluded by the finding of the jury; and if upon the whole he reasonably thought there were facts which justified him in thinking that justice would be better arrived at by an exceptional order it would be his duty to make such order.

The Master of the Rolls has referred to several illustrations of cases in which there might be such oppression or misconduct on the part of a plaintiff as would justify an exceptional order being made, but it is not necessary to go through that class of cases, for we are, I think, agreed as to the construction of the rule. It seems to me that what induced the Lord Chief Justice to make this exceptional order was an imperfect view of the practice as to taxation of costs. It seems to have been thought that in actions of ejectment when the plaintiff having claimed for Blackacre and

Whiteacre together, recovered only in respect of Whiteacre, the costs could not be distributed, and if that were the law I think it would in this particular case in all probability have led to such an erroneous taxation as would have given jurisdiction to the Chief Justice to make the order which he made. But I am satisfied that whether that practice has generally been so understood or not, it is not and cannot be the law. It seems to me, even before the Judicature Act, when there were several demises, the verdict was a distributive one, in ejectment, and that even where there was only one demise and a parcel only of the closes claimed was recovered by the plaintiff, the verdict nevertheless was distributive. *Alcock* v. *Wilshaw* (1) proves that. But since the Judicature Act the old method of proceeding by ejectment has practically ceased, and an action for recovery of land has been substituted, which, subject to exceptions which it is not necessary to mention, is in all respects like other actions. Although by Order XXI., rule 21, a defendant in such an action who is in possession by himself or his tenant need not plead his title, but may set up by way of defence that he is in possession, nevertheless there are issues raised, amongst others the very issue whether he is in possession or not, and I see no reason either in principle or in practice why this kind of action should be treated on taxation as different from any other. It seems to me that, if that is so, full justice will be done in this particular instance by allowing the general rule to work, of the costs following the event.

FRY, L.J. I can in a very few words state my concurrence with the views which have been so fully expressed by the other members of the Court.

The first question which arises is whether the existence or not of good cause to justify the judge in exercising his discretion as to costs can be the subject of appeal. Now, in my opinion, it can. It has been pointed out that the general scheme of Order LXV., rule 1, is this; it places all costs in the discretion of the Court, but upon that there is an exception, namely, where there is trial by jury, and upon that there is a further exception which brings the costs back within the discretion of the judge, namely, where

(1) 6 Jur. (N.S.) 628.

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there is good cause. Now it appears to me that the question whether the facts exist which give the judge the discretion must be the subject of appeal. It is not withdrawn from appeal because the discretion if it exist is not the subject-matter of appeal. Then the question is, whether good cause in this case has been shewn. I will not attempt to give any definition of what "good cause" is, but it plainly must be something which renders it reasonable that the judge should interfere with the rule that the costs should follow the event.

Now in the present case what is there which can be called "good cause?" The plaintiff succeeded in recovering some closes and failed with regard to other closes. What is there beyond that? It appears to me there is nothing. The Solicitor General argued that that fact alone was good cause; because he said, if the judge did not interfere, the effect would be to give the whole costs of the action to the plaintiff. But is it true that in a case of this sort the plaintiff would obtain the whole costs of the action? It appears to me that that would not be so, for the event in this case is a distributable event. The very form of the judgment shews that it is so, for it shews that the plaintiff recovers only certain of the closes, and it shews with equal distinctness that he fails to recover the others. Therefore, whether one looks at the form of the verdict, or of the judgment, it is distributive, and the event with which it deals is not a single one. That being the case, I think that upon taxation, the costs would follow those distinct issues. Is then the fact of the success of the plaintiff on some issues, and of his failure on other issues, by itself good cause for interfering with the rule that the costs follow the event? I am bound to say that it appears to me not to be so. I am of opinion, therefore, that there was no good cause shewn, and consequently that the Lord Chief Justice had not jurisdiction to make the order, and that the order must be set aside.

Appeal allowed.

Solicitor for plaintiff: *Vanderpump, for W. P. Price, Brecon.*

Solicitors for defendant: *Gregory, Rowcliffe, & Co., for G. L. Harrison, Welshpool.*

W. P.

[IN THE COURT OF APPEAL.]

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Jan. 17.

ATTORNEY-GENERAL *v.* HUBBUCK AND OTHERS.

Revenue—Probate Duty—Realty forming part of Partnership Assets—Conversion.

The shares of partners in realty forming part of the partnership property must be regarded as personal estate in the absence of any binding agreement between the partners to the contrary; and probate duty is payable on a deceased partner's share in such realty irrespective of the question whether or not there is in the event any actual conversion into personalty.

Custance v. *Bradshaw* (4 Hare, 315) discussed.

Judgment of Queen's Bench Division (10 Q. B. D. 488) affirmed.

APPEAL of the defendants from the decree of Pollock and Huddleston, BB., and North, J.

The facts of the case are fully stated in the report of the proceedings before the Queen's Bench Division. (1)

Jan. 15, 16, 17. *Ince*, *Q.C.*, and *Maidlow* (*Grantham*, *Q.C.*, with them), for the defendants. The question is, whether realty under the equitable doctrine of conversion is to be taken as personalty within the meaning of the statutes as to Probate Duty. The property as to which the information relates is actually land, and it cannot be said to have been personalty, at least when W. A. Hubbuck died. The equitable doctrine is stated in the note to *Fletcher* v. *Ashburner* (2), and no doubt it has been applied to partnerships. Where land is held for partnership purposes, Courts of Equity have decided that the only interest of the partners is in the balance of the partnership assets arrived at after taking the accounts. Therefore in partnerships the property is held subject to an implied trust for sale, because in order to effect the ultimate winding-up of the partnership and to get at the balance of the assets a sale must take place, and for this reason the partners are

(1) 10 Q. B. D. 488.

(2) 1 W. & T. (L. C. in Eq.) 903, 917, 928, 933, 5th Ed.

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trustees for sale of the land vested in them for partnership purposes: *Darby* v. *Darby*. (1) But the partners may at any time elect to treat the land as land, and not to treat it as personalty. It will nevertheless remain part of the partnership assets. In the present case before the death of W. A. Hubbuck the partners elected to treat the land as realty. It, therefore, ceased to be personalty for the purposes of the partnership, although it remained a portion of the partnership assets; and that election was made when it was agreed that W. A. Hubbuck should execute a will. It was a binding agreement, for E. M. Hubbuck could not depart from it, having allowed the testator to make his will on the faith of it: Lewin on Trusts, 5th ed., part i., ch. 5, s. 3, p. 51. Originally the doctrine, that the land of the partnership was held subject to an implied trust for sale, did not exist: *Thornton* v. *Dixon* (2); *Bell* v. *Phyn* (3); but whatever alteration may have been effected by later decisions, in the present case the will, made with the assent of the partner and brother, Edward, is conclusive evidence of an election to re-convert. Land may be used for partnership purposes, and nevertheless may retain its character of realty: *Rowley* v. *Adams* (4); it may become unnecessary to sell it, or the partners may agree not to sell it, and in that case it ought not to be treated as personalty: *Custance* v. *Bradshaw* (5); *Cookson* v. *Cookson*. (6) The character of the property can always be altered by the conduct of the partners, which may be evidence of an agreement: *Steward* v. *Blakeway* (7) It was always open to the partners to convert the real estate of the partnership into the separate property of the partners, so as to remove from it the liability to be sold, an incident which the law would otherwise by implication have attached to it: Lindley on Partnership, 4th ed., vol. i., bk. 3, ch. iv., s. 3, p. 654; *Dinham* v. *Bradford*. (8) At the death of the testator the land was not subject to the incidents of partnership property, and was not liable to be sold. It was decided in *Custance* v. *Bradshaw* (5) that where real estate being the assets of a partnership has not been sold, it is not liable to

(1) 3 Drew. 495.
(2) 3 Brown, C. C. 199.
(3) 7 Ves. 453.
(4) 7 Beav. 548.
(5) 4 Hare, 315.
(6) 8 Sim. 529.
(7) Law Rep. 4 Ch. 603.
(8) Law Rep. 5 Ch. 519.

probate duty; it is submitted that this case is still good law: *In re De Lancey's Succession* (1); in the present case the land has not been sold by virtue of the partnership. Further, no probate duty is payable unless there is an actual conversion of the property: *Custance* v. *Bradshaw.* (2)

[BRETT, M.R. That view of the decision appears to have been dissented from in *Forbes* v. *Steven.* (3)]

The decision in *Forbes* v. *Steven* (3) is not binding upon this Court, and may be overruled. The power of partners in dealing with partnership property is very wide: *Pilling* v. *Pilling.* (4) It was a mere accident that the agreement between the partners was embodied in the will of one of them. Then after the death of W. A. Hubbuck the property passed by his will to his widow; the surviving partner paid rent for it, and the widow by her will dealt with it as realty. This was sufficient to convert the property, even if it must be considered to have been personalty at at the death of W. A. Hubbuck. The question whether the property has been reconverted, will depend upon the manner in which it is treated: *Sharp* v. *St. Sauveur* (5); *Cookson* v. *Cookson.* (6)

Sir H. James, A.G., and *Vaughan Hawkins*, for the Crown. In order to defeat the claim of the Crown to probate duty, the property must be re-converted into realty before the death, not contemporaneously with it; it is insufficient if the partners agree that the property shall be personalty up to the time of death, and realty afterwards. The agreement alleged to be contained in the will is insufficient, for the testator might have revoked his will at any time, and no action for breach of the agreement could have been maintained against his representatives. It is immaterial how the land has been acquired; it becomes personalty if it is used for partnership purposes: *Waterer* v. *Waterer.* (7) The executors could not carry out the directions of the will without authenticating their title by obtaining probate, and this shews that the property was personalty. The will does

(1) Law Rep. 5 Ex. 162.
(2) 4 Hare, 315.
(3) Law Rep. 10 Eq. 178.
(4) 3 D. J. & S. 162.
(5) Law Rep. 7 Ch. 343.
(6) 12 Cl. & F. 121.
(7) Law Rep. 15 Eq. 402.

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not contain an agreement; it merely confers a power upon the executors to let the land to the surviving partner; and he might have refused to be bound by the will, and might have insisted that the land should be sold; the executors also might have sold it at their discretion. If the partners had really come to an agreement as to the land, they would have embodied it in a written document.

Grantham, Q.C., did not reply.

LORD COLERIDGE, C.J. I am of opinion in this case that the judgment of the Court below was correct. The case has been argued at great length; but it turns upon what seem to me to be elementary principles of law. It is admitted on all hands that real property belonging to a firm is impressed by the law of England with the character of personalty. Reasons have been given for that doctrine, but into those reasons it does not appear to me to be necessary to go, although the existence of those reasons and the character of them have been made the grounds of extremely ingenious suggestions, for the principle of law is well established and universally acknowledged. I observe that it is said that that is figurative and metaphorical language. In one sense it is figurative and metaphorical. The land is not turned into sovereigns, and therefore the language is, in one sense, metaphorical, but for all practical purposes and for the purposes of the duties leviable upon that land, it is treated by the law as personal property. I understand it to be admitted that by any binding agreement—an agreement enforceable either in a court of law or a court of equity, and the provisions of which are to take effect in the lifetime of the parties—that rule of law may be superseded. But it can be superseded only in this way, as I apprehend, that the portion of property which is made the subject-matter of such an agreement as I have suggested, by the operation of that agreement, from the time when the agreement is made, is taken out of the partnership property and ceases to be governed by the rule of English law in relation to partnership property. I apprehend it to be perfectly clear that those are elementary propositions established by the highest authority. Many cases have been cited, but it is enough for my purpose to cite a case decided by

the highest tribunal, *Attorney-General* v. *Brunning* (1), and the language of Lord Cranworth in giving judgment in the House of Lords in that case is, to my mind, conclusive. I cite the language of Lord Cranworth, not because it at all differs from that of the other noble and learned Lords—it does not—but simply because it is shorter and clearer than that used in any other of the judgments given in that case. It appears to me that the authority of the House of Lords, as expressed by Lord Cranworth, is directly in favour of the proposition that I have laid down. He is dealing with *Matson* v. *Swift* (2) and *Custance* v. *Bradshaw* (3), and he is pointing out that those cases, in the sense in which they have been ordinarily understood, are not law; but also he points out the sense in which they are law, and in expressing his opinion of what they really do decide, he explained very clearly what his own notion of the law was. He says (4) that "in *Matson* v. *Swift*" (2) (which was decided by Lord Langdale), "the estate remained real estate at the death of the testator, and was only convertible into personalty by virtue of his direction; a direction, it is true, declared not by his will, but by a previous deed, but which however he might have revoked or varied by his will, if he had thought fit. And the conversion into personalty therefore may truly be treated as having depended on his will." That, Lord Cranworth says, was the true effect of that decision, and he says that the decision was right, because it treated the conversion, which was to be considered as made by the will, as made too late, as made after the death, after the time at which the fiscal duties (whatever they were) attached. Then Lord Cranworth goes on to say, "In *Custance* v. *Bradshaw* (5) Sir James Wigram proceeded upon the same ground, namely, that at the death of the testator the property in question was real estate, and that if it was ever to lose that quality it would be by some act to be done after the testator's death." And inasmuch as it was to be done by a will, and by an act taking effect after the testator's death, in that case also Sir James Wigram held that the conversion was too late, for it was not done in the lifetime of the parties.

(1) 8 H. L. C. 243.
(2) 8 Beav. 368.
(3) 4 Hare, 315.
(4) 8 H. L. C. 260.
(5) 4 Hare, 315.

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Lord Coleridge, C.J.

In that passage of Lord Cranworth's judgment, and the exposition that he gives, the law is laid down—it is quite unnecessary for me to say whether correctly or incorrectly, I assume correctly—but it is wholly immaterial for me to consider whether correctly or incorrectly, because he is speaking in the House of Lords, and it is in the sense in which he is explaining them in the House of Lords that those authorities, if they be authorities, are to be read in future. In that way, therefore, it seems to me that Lord Cranworth lays down that whatever the character is that is impressed upon the property by the law at the time when the breath leaves the body of the owner, that is its character for the purpose of the fiscal duties which are alleged to attach upon it. Now that seems to me to be clear, and the question is whether there is anything in the evidence or the documents before us to shew that by a binding agreement which could be enforced in law or in equity, and which was to take effect during the lifetime of the parties, the property in question was taken out of the partnership assets. The way in which it is sought to be taken out, as I understand it, is this: Certain real estate was occupied by the partners, and used for the partnership business; in the absence of any agreement to the contrary, that would be treated as personalty, and would pass to the executors, and have to pay the duties levied upon it, which are now in dispute before us. But it is said that the two brothers, William Augustus and Edward Martin, agreed in order to prevent an intestacy as to this real property, and the effect of an intestacy, which would be, as the two brothers thought, inconvenient to the business, that William Augustus should make a will, and it is said that the property was taken out of the ordinary rule of law with regard to partnership property, and was reconverted by the effect of the will into real estate, and therefore into estate that would not be subject to the duties which are now claimed. Now what is the evidence of that agreement? Direct evidence there is none, it is admitted. The indirect evidence of the agreement is said to be the existence of the will, to the provisions of which our attention has been called. The will was made when William Augustus was very ill; and as regards the matters now in hand, all the provisions of that will were submitted to Edward Martin, the

other brother. Edward Martin appears to have been the agent between William Augustus, his brother who was ill in bed, and the gentleman who drew the will. He took the instructions and, as I understand, saw the solicitor upon the subject; and it is not denied that he was fully cognisant of the provisions of the will as regards the matter now in dispute before us. First of all, on the assumption that this will was sufficient to turn the land from personalty into realty, it is suggested to us that it is shewn that an agreement had been made in the lifetime of William Augustus (whether it was enforceable or not I will consider in a moment), and that in pursuance of that agreement he, in his last illness, made, with the knowledge of his brother, the will which is said to have effected the change in the character of the property. It does not, however, appear to me that there was any binding agreement between these parties. If two partners agree that in consideration of each of them doing some particular thing, some result shall follow upon a particular portion of the partnership property, that may have the incidents of an agreement enforceable in the High Court, and such an agreement, at the time of its coming into existence, may operate to change the character of the property. But in this case there was no binding agreement. No consideration for this agreement was given by the person who now seeks to take advantage of it, if agreement there were. There was nothing at all at the very outside but a permission to make this will, and if he did not think fit he was at liberty not to make it. And further it was a will which it was within his breast to revoke, and it is very faintly denied that if he had died without making the will, or had made the will and revoked it, there could be no doubt under the circumstances that the property in question would be personal property, and that the Crown would be entitled to succeed. Then, without a binding agreement, and merely by the operation of a will which his brother was aware of, and which by the very necessity of the case could not operate until after the partnership had been dissolved by death, what is there to shew, or what ground is there for saying, that such a will would be any evidence of such an agreement as I have spoken of, and, if it were evidence of any agreement, what agreement was there which the law would sanction? Upon that

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last matter I do not desire at the present moment to say anything, because I believe we are not altogether agreed as to the possibility in law of such an agreement. I prefer, therefore, to base my decision in this case upon a ground on which I believe we are all agreed.

It seems to me that even if this will did clearly express what it was intended to effect, it was not valid; if the true construction of it was what has been contended for, then it was not valid for the purpose for which it has been put forward. Even if we assume the true construction of this will to be that which is contended for on the part of the appellants, the will itself is not sufficient to turn this property from personalty back into realty. But when I look at the will itself, I entertain the gravest doubts whether, whatever may have been the actual intention of the parties, the language of this will was such, according to the ordinary rules of construction, as to effect the change in question. I cannot say whether all the members of the Court agree in the view to which I am now about to give utterance, but it is my view. In the defendants' answer the views of the two brothers are set out, and it is there stated that the object for which this will was drawn up and executed was, not with the intention of carrying into effect the agreement which has been suggested, viz., that the property should be turned from personalty back into realty, but, on the assumption that it was realty already, that an intestacy should be avoided, and in order to prevent the inconvenience to the partnership business which an intestacy would produce. I do not mean to say that if the will had in clear terms endeavoured to change this property from personalty into realty, the private intention of the maker, or the private intention of the person who stood by and let him make it, would be proper to be considered in construing the will; but when the question is as to an antecedent agreement, the circumstance that the two parties to the supposed agreement were unaware that it was necessary to be entered into, is a very strong fact. If it is plain that the two parties believed a state of things to exist which would make an agreement unnecessary, it strikes my mind as reasonable to assume that they would not have made an agreement which, by hypothesis, they had no reason for making. We come then, to a

consideration of the will with this strong fact, that there is considerable evidence which is inconsistent with the hypothesis that the suggested agreement ever existed in point of fact. Then what do the words of the will amount to? The terms of the will might undoubtedly have been more clearly expressed, but so far as I can judge, the true effect of the will is by no means more than this, to treat this property as property in which the maker of the will, the testator, had an individual and separate right. The will does deal with this property in language capable no doubt of being construed to the effect, that he supposed he was dealing with a share in real property; but it is equally consistent with another construction, and I think that that is really the true effect of the will. This freehold property having been taken into the account in the first instance in estimating the share of the capital of the partnership with a portion of which the testator was dealing, he went on to say with regard to so much of the partnership property as consisted of these freehold premises that his share in that portion of the partnership assets should be disposed of in a particular manner; his brother might have the option of becoming tenant of this property, or of occupying this property at a certain fixed sum (*not* "rent" in the proper sense of the word), that fixed sum to be ascertained by a certain value appearing in the stock-taking account. He does not in terms go on to say what shall be done in case his brother does not elect to take the property, but, after making provisions with respect to this and other portions of the partnership estate, he proceeds to deal with the residue, and I think it was not denied that if there was no sale to the brother he was to occupy it upon paying a certain sum, and if he chose, he was to buy it for a certain sum. That sum was also to be ascertained with reference to the last stock-taking prior to his decease. It was somewhat feebly denied, that if the brother had elected neither to occupy nor to buy, as of course he might have done, there was nothing in the nature of the case to compel him to do the one or the other; then the only operation of the will would have been under the general clauses to treat it as part of the residue of the property, real and personal. It seems to me, that even if the will could be construed as a performance of a binding agreement, there are no such words in the will as to

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operate upon this property, being at that time certainly personal property. There is nothing in that will to shew that by the execution of an agreement between the parties it was turned from personal property back into real property. The utmost effect which the supposed agreement could have is what has been pointed out in the course of the argument, namely, that the brother, who had stood by, and indeed had himself joined, so to say, in making the will, he being instrumental in getting the will drawn in its present shape, would be prevented from denying in any Court of Equity that the will, so far as he was concerned, had the operation which it appeared to have. It seems to me that, both upon principle and upon the particular facts of the case, it is clear the Crown must succeed upon their first claim.

It is sufficient to say, as it seems to me, upon the second claim that all the arguments and reasonings which are of avail upon the first claim, that is, in the case of the will of William Hubbuck, are available in the case of the second, that is to say, as to the will of the widow. If the will of the first testator cannot effect the change, neither can the second will, the will of the testatrix; and the Crown is entitled to succeed upon the second head of its claim for the second duty, as well as upon the first. For these reasons I think the judgment of the Court below was right and must be affirmed.

BRETT, M.R. This is an information brought by the Attorney-General in order to recover probate duty in respect of property to which the parties have become entitled under two wills. The Crown, therefore, claims this duty as upon property which was personal at the time of the death of the two testators. In answer to that it has been argued that, at the time of the death of one or both of the testators, the property which passed under the respective wills was not personal, but was real property, namely, land in respect of which no probate duty is due. It was argued further that if the property was in equity personal property, nevertheless, inasmuch as it was in reality land, the Crown could not recover probate duty in respect of it. With regard to the second point, I confess I have never had any difficulty whatever. If, at the time of the decease the property is in law, whether by

the common law or in equity, personal property, the very words of the Act as to probate duties strike it, because it gives a duty to the Crown upon personal property. I should, therefore, have decided that point clearly in favour of the Crown, even if there had been no authority for it. But it seems to me that the case of *Attorney-General* v. *Brunning* (1) is distinct upon that point, whether it is or is not an authority upon the other. But it is said that this property had become land both at law and in equity on the death of both the testators. Now, I will not say how many questions have been raised during the argument in this case—questions which I hope never to hear of again, and certainly questions upon which I do not pretend to give judgment. Many questions have been raised as to what terms may be made by partners in their partnership agreements, and many questions have been raised as to what terms in their partnership agreements will make property partnership property. I decline wholly to enter upon those points. It was necessary, perhaps, in order to sift the point which we have to determine, to consider them during the argument; but, in the result, it becomes unnecessary to give any opinion about them. The facts of this case, which are undisputed, and the law of the case, which is undisputed, are these: that, although part of the partnership property here was in fact land, and therefore at common law would always remain land, yet, by reason of the equitable doctrine, inasmuch as this land was made a part of the partnership assets, it was in equity, or it became in equity, personal property. Now, there is no dispute about what were the terms originally of the partnership articles. There is no dispute here that the terms of the partnership articles were such that this land did go into the partnership in equity. It is admitted that it would remain so in equity, until the death of the first partner at all events, and would be personal property in equity at his death, unless there was something which in equity (for law would not apply to it) would reconvert the property, so that in equity as well as in law it might be entirely dealt with as land. Now what is it which, according to equity, could, under such circumstances as exist in

(1) 8 H. L. C. 243.

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this case, reconvert that property (which it is admitted was partnership property and in equity personal property) into land, so that it should be land at the death of this first testator? It is said that it would be re-converted by the election of the partners. But then arises the question, what constitutes such an election as would re-convert it? It cannot be asserted that the election of one of the partners would do; it must be the election of both. But what is it which will constitute an election in equity? It seems to me that nothing will constitute an election in equity, but that which would be a binding agreement in law. Then what is a binding agreement? What makes an agreement binding? An agreement is not binding, unless some remedy can be given in respect of a breach of it, either at law or in equity. If no remedy can be given in respect of a breach of it either at law or in equity, it obviously is not binding on either party, because either party might fly from it or break it (whichever is the more correct term,) without any consequence. If that is so, it is not binding. There must be a binding agreement. But the question is whether the property is re-converted back to land at the time of the death of the partner? Now what is necessary to re-convert it at the time of the death? It seems to me, upon the authority of the case of *Attorney-General* v. *Brunning* (1), that to re-convert this property, that is, this land which had become partnership property, so as to make it land at the death of William Hubbuck, there must have been a binding contract, that is, a contract on which some relief could be given at law or in equity, the performance of which would affect the property during the life of William Hubbuck. It is said that the contract re-converted the property. If there was a binding contract, the performance of which could affect the property only after the death, the property is not affected at the time of the death, and there is no re-conversion. That proposition seems to me to be in substance the proposition laid down by Lord Cranworth and the other noble Lords in their judgment, as governing the case of *Attorney-General* v. *Brunning*. (1) Then the first question that arises is, was there any binding agreement between these

(1) 8 H. L. C. 243.

partners? What is the agreement which is suggested? A promise to make a will is not binding and is no agreement at all: it cannot be enforced, no remedy can be given in respect of such a promise. That we held in this Court some time ago, and that was supported by the House of Lords. (1) And it is not contended that there is more than a mere promise to make the will in this case. If the promise is this, that Edward agrees that William may make a will dealing with his property as land, what consideration is there moving from Edward, either for advantage to William or detriment to himself? William might retract his promise at any moment before death. Therefore it seems to me that there was no consideration for the alleged agreement. But, if there was, it was an agreement that property might be affected in a particular way by a will. Therefore the performance of that contract would only affect the property after the death of one of the partners. That is the view laid down by Lord Cranworth. Then if the principle which I have stated is the principle to be deduced from what Lord Cranworth says, I should have been of opinion, even though the suggested agreement had been made out, that no will, whatever its form might be, could have reconverted this property so as to make it other than personal property at the time of the death of the testator. But then comes the question whether the alleged agreement is made out. That is brought before the Court in a very peculiar way: it is said that the only evidence which the parties can give of the agreement is evidence, that the will does what the agreement allowed it to do; and therefore in order to see whether there was an agreement that the will should be made in the form in which it is, the will is to be looked at. If the will does not treat the property as land, we are to take it that there was no agreement that it might be treated as land. The interpretation of the will seems to me to be quite as difficult as the doctrines which have been vouched in support of it; but, upon the whole, looking at the terms of this will, I incline to the opinion at all events (I think I may go so far as to say that I am of opinion), that this will does not treat the property as land; and that if it does not,

(1) It is presumed that Brett, M.R., referred to *Alderson* v. *Maddison*, 7 Q. B. D. 174; 8 App. Cas. 467.

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there was no agreement that the property might be treated as land; and for that reason also it must be treated as still being within the equitable doctrine, and as being personal property at the time of the death of William. But I am not at all pretending to say that if some other suit had been instituted, or some other dispute had arisen, the fact of an agreement (if it could have been proved) would have been immaterial, because if the true construction of the will be that it deals with the property as land, and if the agreement was that it might be so treated, although that agreement and that will would not, in my opinion, have made the property personal property at the time of the death so as to oust the Crown, yet upon taking these circumstances together, namely, the agreement that it might be made, and the fact of its having been made, and the knowledge of Edward that it had been made, in any suit between him (Edward) and the executors of William or any other person, I think that Edward would have been in equity estopped from saying that the will was not properly made. But it is only in order to create an estoppel in equity that the agreement of Edward that William might make his will in that way could have been of any consequence, and that was of no consequence in this case; because, even though Edward might have been estopped, there is no estoppel against the Crown; and the rights of the Crown must depend upon what was the condition of the property, not by way of estoppel, but by way of equitable principles. Therefore with regard to the claim of the Crown for probate duty as against those who took this property under the will of William Augustus, it seems to me that the Crown is entitled to succeed, because that property was in equity personal property at the time of the death of William Augustus.

Then, with regard to the widow and the property passing under her will, it was said that the case was different. It was urged that after the death of William, and before the death of the widow (and this is upon the assumption that the defendants are wrong as to the first point), although she took it as personal property from William Augustus in shares with the surviving partner Edward, yet that she and that surviving partner Edward had before her death reconverted it into land. There was nothing,

however, to shew any agreement between the widow, or the executors, and Edward Martin. But then it was said that the widow had treated it in her will as land. The case is weaker on this than on the other point if it is put upon that footing; because, even though she did so treat it, there is no evidence of an agreement with Edward that she might do so. And in accordance with the decision which we have come to in the first point, we must come to a conclusion as to the second. I will only say that a great many cases have been cited with none of which will I deal except with *Custance* v. *Bradshaw* (1). I am of opinion that in a court of law *Custance* v. *Bradshaw* (1) ought never to be cited again as an authority.

BOWEN, L.J. We start in this present case with this, that the land in question was at one time partnership property, and that it remained partnership property to all intents and purposes, at all events down to the date of the alleged agreement between the partners that the property should be dealt with by the one partner in a certain way. If it was partnership property it was personal property, for it is an established principle in equity that when money is directed or agreed to be turned into land, or land agreed or directed to be turned into money, equity will treat that which is agreed to be, or which ought to be, done as done already, and impresses upon the property that species of character for the purpose of devolution and title into which it is bound ultimately to be converted. This doctrine of conversion necessarily affects partnerships; partnership property is that which is held by the partners as such for the purposes of the partnership; it is held for the purpose of carrying on the adventure of the partnership, and may be wanted for that purpose, and moreover, at the time of the winding up of the partnership the debts of the partnership will have to be paid, the question of their amount settled between the partners, and then the unexhausted assets divided between them. The partnership property must thus be treated in the end as subject to a trust for sale, and therefore it is personal property. That is explained in *Darby* v. *Darby* (2) in a passage which has been set forth at length by the Court

(1) 4 Hare, 315. (2) 3 Drew. 495.

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below. (1) If that is so as regards all the partnership property, land, when it is brought into and made part of the partnership property, becomes of course personalty, that is to say, its devolution will be affected by the fact that it has been brought into the partnership accounts and assets. How is the character of personalty which has once been impressed upon land to be withdrawn or altered and the land remitted to its original character of realty? It seems to me that in the case of partnership property land can be remitted to its original character only by virtue of such an agreement made between the partners as withdraws the land from the partnership assets and puts an end to the implied trust for sale. If it was made out that the partners had during the partnership agreed, however unusual the proposition and however impracticable such an arrangement might be in business, that at the death of one of the partners the land should not be sold or dealt with as part of the partnership assets but held on a tenancy in common, I am not prepared to say that the land might not cease, upon such an agreement being made, to be personalty. If it is withdrawn from the partnership assets, to that extent it seems to me that the reason why it is considered personalty might possibly be affected. Nor should I be prepared to hold, though I do not say that the law may not be to the contrary, that, however unusual in business it might be, the parties might not agree that a portion of the partnership property should, upon any given event happening, be withdrawn from the partnership assets, or that the effect of such an agreement would not in such a case be to change its character into realty. But it seems to me clear, whatever may be the law as to these questions, that the time when the death takes place is the moment at which it has to be decided whether the property in question is realty or personalty. Whatever agreement is to affect the character impressed upon the property at this specific moment of time must be in the first place a binding agreement, and in the second place it must be an agreement which shall take effect at the moment of death. Let us take, first of all, something outside partnership altogether. Take the case of a man who can by his election reimpose the character of realty upon land which, but for his election, would

(1) See 10 Q. B. D. 497, 498.

continue to be treated as personalty; he must make that election by some act not subsequent to the death; he cannot leave a will which after he is dead is to decide what is to be the nature of his property at the moment of his decease. I need only refer to *Attorney-General* v. *Brunning* (1), and to the observations contained in the judgment of the House of Lords upon the subject. If a will, which can only operate after the death of a man, is too late to operate as an election on his part which will reimpress the character of realty upon that land which has been personalty until then, it seems to me that an agreement between two partners will not be effective unless it is not merely binding, but is an agreement which becomes binding before the death, so as to take effect at the death. An agreement would not be sufficient which only becomes binding by reason of one partner having performed his part of the agreement by will; it then would be an agreement which only becomes binding by something which would be performed too late to have any effect upon the character of the property. It seems to me that the *Attorney-General* v. *Brunning* (1) shews that that would not be sufficient. Now, let us see in the present instance what the character of the agreement is upon which the defendants rely. First of all, was there any binding agreement? I will not say that there was not sufficient mutuality between the parties to make what was done between them binding. I do not think it necessary to say that an agreement between the partners to change the terms of the partnership might not be binding. It has been suggested that it became a binding agreement by virtue of the fact, that one party was allowed by the other to act upon the faith of its being one to which the latter would submit. Assume that to be so. Still the agreement falls within the difficulty which I have indicated, namely, that it becomes binding by reason of being performed by a will, that is, by reason of being performed by something which takes effect too late. But supposing even it was a binding agreement from the outset, what was its nature? It was an agreement that property should be affected by a will, and in that view of the case it again falls under the same difficulty, it is an agreement that a certain property should be affected by something which is done

(1) 8 H. L. C. 243.

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too late to affect it. However, I will assume that all these difficulties might be got over; I will assume, for the purposes of argument, that there was a binding agreement that one of the partners should affect his share of the property by a will; and I will assume, for the purposes of argument, that that would be sufficient and would not fall within the objection of the House of Lords in *Attorney-General* v. *Brunning* (1). Take it that there is a valid agreement to affect this property by will. At most it cannot be an agreement to affect it further than the will does affect it or purports to affect it. I have studied this obscure document, the will, over and over again, and I must confess that I cannot see any clear indication of an intention to withdraw this share from the partnership assets. It lies with those who wish to withdraw it from the position of partnership assets to shew that it was so withdrawn; and they only point to a will which seems to me to be ambiguous, if it is not indeed more in favour of the property remaining partnership assets than in favour of the idea of its being withdrawn from them. For this reason I agree with the view which has been expressed by the Lord Chief Justice and the Master of the Rolls with regard to the first part of the case; it is substantially, I think, the same ground as that upon which the Court below decided the case. And with regard to the second part of the case, it seems to me I need add nothing to what has been said by the Master of the Rolls and the Lord Chief Justice.

Judgment affirmed.

Solicitor for the Crown: *Solicitor to the Inland Revenue.*
Solicitors for Defendants: *Stones, Morris, & Stone.*

(1) 8 H. L. C. 243.

J. E. H.

[IN THE COURT OF APPEAL.]

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May 9.

THE GUARDIANS OF THE POOR OF HEADINGTON UNION, APPELLANTS; THE GUARDIANS OF THE POOR OF ST. OLAVE'S UNION, RESPONDENTS.

Poor Law—Removal of Children—Settlement—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

Where neither the father nor mother of a pauper child has acquired a settlement in his or her own right, and after the father has died the widowed mother has deserted such child, who is under the age of sixteen, and has not acquired a settlement for itself, such child is by 39 & 40 Vict. c. 61, s. 35, to be deemed to be settled in the parish in which it was born, and an order for its removal to a parish in which it was not born but in which its father was born was quashed, because, in that case, it could not be shewn what settlement such child derived from its father or mother without inquiring into the derivative settlement of such parent, which was prohibited by that section.

CASE stated by the Surrey Quarter Sessions upon an appeal against an order of removal adjudging the last legal settlement of Alfred Collier, aged seven years, Henry Collier, aged six years, Victor Collier, aged four years, and Daisy Collier, aged three years, to be in the parish of St. Giles, in the appellant union, and ordering their removal from the respondent union to the appellant union. The material facts as stated in the case were the following:—

Alfred, Henry, Victor, and Daisy Collier, were the lawful children of Richard Randall Collier, who died on the 7th of November, 1879, and of Mary Collier, his wife, who was still living at some place unknown. All the children were born out of the appellant union, and neither Richard Randall Collier nor Mary his wife acquired a settlement in his or her own right.

It was proved or admitted that Richard Randall Collier was the lawful son of John Collier, and was born on the 6th of October, 1842, in the parish of St. Giles, in the appellant union. It was also proved that John Collier acquired a settlement in the appellant union by renting a house in St. Giles parish for which he was rated and paid the rates from 1850 to 1853.

The sessions decided that the case came within the first clause

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of s. 35 of 39 & 40 Vict. c. 61, and that the children took the settlement of their widowed mother in the appellant union and dismissed the appeal subject to the opinion of the Queen's Bench Division upon a special case.

The Queen's Bench Division affirmed the order of quarter sessions without hearing the special case, on a preliminary objection to its form in stating that if the Court should be of opinion that the appeal ought to have been allowed and the order of removal quashed, judgment was to be entered accordingly at the quarter sessions.

The appellant union appealed.

Before the appeal was argued, it was agreed, with the consent of both parties, that the preliminary objection should be disposed of by treating the matter as an appeal from a refusal of the Queen's Bench Division to quash the order of removal, and also the order of quarter sessions confirming such order.

Bosanquet, Q.C. (*J. Shortt* with him), for the appellant union. The question is whether the children can be ordered to be removed to the appellant union. Now, by the first part of s. 35 of 39 & 40 Vict. c. 61 (1) derivative settlement is abolished with the exception of two cases, namely, "of a wife from her husband" and "of a child under the age of sixteen, which child," it says, "shall take the settlement of its father or of its widowed mother, as the case may be, up to that age." Here the father is dead, and he died without having acquired any settlement of his own, and as his settlement was only a derivative settlement, no

(1) By 39 & 40 Vict. c. 61, s. 35, "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

evidence of his settlement was admissible in the case of the removal of his widow or children: *Reg.* v. *Guardians of Bridgnorth* (1).

There was nothing to shew that the widowed mother had any settlement of her own, and as she would therefore only have her husband's, which was a derivative one, the children must go to the parish where they were born, which was not in the appellant union.

[He was then stopped by the Court.]

Philbrick, Q.C., and *F. Mead* (*Reginald Brown* with them) for the respondent union. In *Guardians of Liverpool* v. *Overseers of Portsea* (2), where the question was as to the removal of a widow and her children, in a case in which neither the widow nor her late husband, the father of the children, had acquired any settlement for themselves, it was held that the children were rightly removed with their mother to the settlement of their father, which was his birth settlement. There, Lord Coleridge, C.J., said, "It appears that the father of the children had a birth settlement in Liverpool, and his wife had no settlement of her own and therefore acquired her husband's settlement. I am bound to say that I see no reason why the children should not take their father's birth settlement."

[BOWEN, L.J. There there was no evidence that the father had any derivative settlement. In the late case of *Reg.* v. *Guardians of Marylebone* (3) we held that an inquiry must be made as to the settlement of the parent of the children in order to see whether it was derivative or not.]

Here it was shewn that Richard Randall Collier, the father of the children, had a birth settlement in the appellant union, and there was therefore no necessity for inquiring into his derivative settlement, and the children being under sixteen would take the settlement of their father, as their mother had not acquired any of her own. A birth settlement gives the person directly he is born a status of settlement. So that the settlement of Richard R. Collier, which he had by his birth in the appellant union, was an original and not a derivative settlement, and moreover, as his

(1) 11 Q. B. D. 314. (2) 12 Q. B. D. 303.

(3) Ante, p. 15.

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father's settlement by renting was in the same parish it did not alter the birth settlement.

BRETT, M.R. In this case four legitimate children whose father was dead, and whose mother had deserted them, having become chargeable to the parish in which they were found, an order of justices was made, and affirmed by the quarter sessions, that they should be removed to the place of settlement of their father. In the Queen's Bench Division a preliminary objection was taken that that Court could not decide on the merits on account of the form in which the case was stated, and by reason of such objection being upheld we have not the decision of the Queen's Bench Division upon the merits. We are not called upon to give any opinion as to whether that preliminary objection was rightly fatal, because, by consent, we are to treat the case as if the order of the quarter sessions had been brought up to be quashed. Therefore the point before us is whether the order to remove these children to the place of settlement of their father was right. The settlement of the mother is not known; nor is it known whether she had acquired any settlement of her own. If she had not acquired any settlement, and she herself had had to be removed, she would have been removed, I have no doubt, to the place of settlement of her husband. In this case, however, there is no question as to the removal of the mother, but only as to the removal of the children without the mother.

The case depends on the construction of the 35th section of the 39 & 40 Vict. c. 61, and I say again that I cannot see any clear reading of that section. The words of the section are: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise," that is, no person shall be deemed to have derived a settlement at all. Then the section goes on to say, "except in the case of a wife from her husband, and in the case of a child under the age of sixteen." There are thus two exceptions. With respect to the wife there is no affirmative enactment, but she is only dealt with by way of exception. With regard to the child, there is an affirmative enactment, "which child shall take the settlement of its father, or of its widowed mother, as the case may be." One

reading of that part of the section would, to my mind, govern this case if it could be read so, without doubt. If it could be read as meaning that where it is the removal of the wife, then the case of the wife is to be excepted altogether as to deriving a settlement; and where it is the removal of a child under the age of sixteen, then the child is to take the settlement of its father, that is if the father is alive, or of its widowed mother if the father is dead, then I think that this case would be governed by it, and these children would take the settlement of their mother. If that be the reading of this part of the section, and if the settlement of the mother is to be derived from her husband, which it must be unless it be shewn that she had acquired a settlement of her own, then that is a derivative settlement. If that were so, and it not being shewn that she had acquired any settlement of her own, you could not inquire into the settlement of her husband, and so could not find what her settlement was; and, therefore, the case would come within the terms of the third part of the section, and the children would have to be removed to the place of their birth, and certainly not to the place of their father's settlement. Is it necessary to determine that now? There are great difficulties in holding that, because if it be true, then where the children are above seven and under sixteen, the mother would have to go to the settlement of her husband, but with respect to the children, as you could not get at their derivative settlement except by getting at the derivative settlement of the mother they would have to be sent to the place of their birth. That seems harsh legislation; but it may be that it is right. I think the language of the judgment of Lord Coleridge in *Guardians of Liverpool* v. *Overseers of Portsea* (1) tends to shew that his view is not that, but rather that if the widowed mother has not obtained a settlement of her own, then you inquire what was the settlement of the father. That in effect would not be so harsh, because then if the mother and children were to be removed together, the mother, not having acquired a settlement of her own, would be removed to the settlement place of her husband, and therefore the children going to the place of settlement of their father, both mother and children would go together. But if the

(1) 12 Q. B. D. 303.

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mother had acquired a settlement of her own she would be removed to that settlement, and then you would get at the settlement of the children without inquiring into the derivative settlement of the mother, and there again they would go with her to the place of her settlement. If eventually one could come to that view of the section I should not be sorry. But supposing the view is that if the mother has not a settlement of her own, the children may be removed to their father's settlement, one would have to see in the present case what is the father's settlement. Now we have held that, although if the first part of this section stood alone one could never inquire into a derivative settlement at all, except in the case of removing a wife, or of removing the children, yet when one reads the third part of this section it is obvious that the legislature meant, if it meant anything, that one may, to a certain extent, be obliged to inquire whether the parent's settlement was a derivative one or not, because it says, "if any child in this section mentioned shall not have acquired a settlement for itself," "and it cannot be shown what settlement such child derived from the parent without inquiry into the derivative settlement of such parent, such child shall be deemed to be settled in the parish in which he or she was born." In the recent case of *Reg.* v. *Guardians of Marylebone* (1) we came to the conclusion that that obliges one, when inquiring into the settlement of the child, to inquire whether the settlement of the parent is a derivative one or not; but the moment it has been found out that the settlement of the parent is a derivative one, then one is stopped from inquiring what it was, and therefore the child must be sent to the place of its birth. Now, in the present case, supposing inquiry to be made into the settlement of the father of these children, it is found not only that he was born in a particular parish, but that he was the legitimate child of a father who had acquired a settlement, then what is the settlement of the son? We are told that he never acquired a settlement of his own, and therefore as his father had a settlement, the settlement of the son was the settlement which the father had. That is a derivative settlement, consequently one is at once stopped from inquiring what the

(1) Ante, p. 15.

settlement of the father of these children was and they must go to the parish of their birth. We do not know where that is in the present case, but we know that it is not the parish to which this order of removal has been made. The only thing argued against that was, that the father's settlement was a status, that is, that the moment he was born he had a status of settlement; that is a birth settlement. At the moment a child is born it is said its status of settlement is the place of its birth; but if its father has a settlement, then the very moment the status is supposed to be given to the child, at that very same moment it is taken away, because the settlement of the child is the settlement of the father, and there is not an infinitesimal part of a moment when this status exists. The only object I think of this birth settlement is, that evidence of where a man is born is primâ facie evidence of the place of his settlement. That would come to this, that the child is probably born in the place where its father and mother are living. It may be, by accident, that the child is born where the father and mother have not a settlement, but primâ facie, and particularly in old times, when people could not go by railway, and were more in the habit of living at home, primâ facie, the child was born where its father and mother were domiciled, that is to say, where they were settled.

I give no opinion as to whether my mind goes exactly with that which I am inclined to think was Lord Coleridge's view of the construction of the first part of this section, for it is not necessary to decide that point in this case, because if one differed from him the case here would be clear, and if one agreed with him, nevertheless, the case for this removal would fail, inasmuch as one could not tell what the settlement of the father of these children was without inquiring into it, when it would be clear that his settlement was a derivative one.

For these reasons I am of opinion that this order ought to be quashed.

BOWEN, L.J. I am of the same opinion. The children here are under sixteen years of age, the father is dead, the mother's settlement is unknown, and an order has been made for the removal of the children to the appellant union. The ground of

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the decision to which we have arrived seems to me to be that the settlement of the father has been shewn to be not an original settlement but a derivative one. Then this s. 35 in the first place abolishes derivative settlements except in the excepted cases, among which, no doubt, in the first instance, this case would fall. One of the excepted cases is the case of a child under the age of sixteen, with regard to which it is provided that such "child shall take the settlement of its father, or of its widowed mother, as the case may be, up to that age." These children are under sixteen, therefore they form primâ facie an exception to the abolition of derivative settlement, and they are to take the settlement of their father or widowed mother, as the case may be. Now their father is dead, and it may be said that in such a case it was intended by the section that they should take the settlement of their widowed mother; but her settlement is unknown. It has been argued that in the event of the widowed mother's settlement being unknown the children are relegated to the settlement of their father. It does not appear to me necessary to decide the exact meaning of those words, "as the case may be," which are very difficult to construe, because in any event, assuming the children are to take the settlement of their father, they nevertheless fall within the scope of the third clause of that section, which provides that though they may take the settlement of their father, yet in the event of its being impossible to arrive at such settlement without inquiring into his derivative settlement then they are no longer to follow his settlement, when it is found, but to go to a different place. Here the inquiry shews the father had no original settlement, but a derivative one, and therefore they can no longer be compelled to follow that settlement.

FRY, L.J. I am of the same opinion. The first inquiry arises under the first part of the 35th section, which provides generally for the abolition of derivative settlements, with the exceptions which have been referred to, one of those being the case of a child under the age of sixteen. In that case it is enacted that that "child shall take the settlement of its father or of its widowed mother, as the case may be." Two interpretations have been

put upon the words "as the case may be." On the one hand it is said that they mean that the child shall take the settlement of the father, if the father be living at the time when the question of removal arises, or of its widowed mother, if the father be then dead, and the mother be living. On the other hand it is said that those words refer to the possible contingency of the widowed mother having, subsequently to the death of her husband, acquired a new settlement. I will take the case in the two alternative views. If in this case the children are to take the settlement of the widowed mother, that settlement has not been shewn to be in the appellant union, and therefore the appeal must prevail. If on the other hand the meaning is that the children shall take the settlement of the father, unless the widowed mother has subsequently acquired one, then we are driven to inquire what was the settlement of the father. That leads us to a consideration of the third part of this section, which enacts that in inquiring what the settlement derived from the parent may be, you shall not inquire into the derivative settlement of such parent, that is to say, as it appears to me, you must inquire whether the parent had a derivative settlement or an original settlement. If the parent had an original settlement you may act upon it; if the parent had a derivative settlement you cannot act upon it, but must send the child to the place of its birth. In this case it seems to me plain that the inquiry as to whether the parent had a derivative settlement must be answered in the affirmative, and then you can go no further, and are driven to the conclusion that the children in this case must be referred for their settlement to the place of their birth. Therefore on either alternative construction of the words I come to the same conclusion, and I agree that this appeal must be allowed.

Order of removal quashed.

Solicitors for appellants: *Philpot & Son.*
Solicitors for respondents: *Saw & Son.*

W. P.

1883
Dec. 12.

[IN THE COURT OF APPEAL.]

GRANT *v.* EASTON.

Practice—Writ specially indorsed—Leave to enter Final Judgment—Foreign Judgment—Rules of the Supreme Court, 1883, *Order III., r.* 6—*Order XIV.*

In an action upon a foreign judgment in which the writ of summons has been specially indorsed under Order XIV., the plaintiff may obtain an order empowering him to sign final judgment.

Hodsoll v. *Baxter* (E. B. & E. 884) followed.

THE plaintiff, who resided in Egypt, had obtained against the defendant a judgment dated the 2nd of July, 1883, in Her Britannic Majesty's Vice-Consular Court at Cairo. The defendant resided in England. The plaintiff then commenced in the High Court of Justice an action founded upon the judgment obtained in the Vice-Consular Court at Cairo, and an order was made at chambers by a master, empowering the plaintiff to enter judgment summarily. This order was affirmed on appeal by the judge sitting at chambers, and afterwards by the Queen's Bench Division. The defendant then appealed to this Court.

Rolland, for the defendant. It is contended that leave to enter final judgment summarily cannot be given where the plaintiff sues upon a foreign judgment. Judgment is obtained under Rules of the Supreme Court, 1883, Order XIV., when the writ of summons has been specially indorsed under Order III., rule 6; but that does not apply to a foreign judgment, which is not a debt or liquidated demand in money payable upon "a contract express or implied." The remedy being summary, ought not to be extended. The Judges in the Queen's Bench Division felt themselves bound by the judgment of the Exchequer Chamber in *Hodsoll* v. *Baxter* (1); but in that case the plaintiff sued upon a judgment of the Court of Queen's Bench, and there is a wide difference between the judgment of an English Court and the judgment of a foreign Court: an action

(1) E. B. & E. 884.

upon an English judgment is based upon a debt of record, but a foreign judgment creates only a liability of inferior degree.

Petheram, *Q.C.*, and *Henry*, for the plaintiff, were not called upon to argue.

BRETT, M.R. The words used in Rules of the Supreme Court, 1883, Order III., rule 6, are the same as those contained in the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 25; the words of the rule are in fact a copy of the words of the statute; the rule and the statute, therefore, must have the same effect. *Hodsoll* v. *Baxter* (1) which was cited during the argument, was decided upon the Common Law Procedure Act, 1852, s. 25, and therefore ought to be treated as a decision upon Order III., rule 6. As the Exchequer Chamber was a Court of co-ordinate jurisdiction with our own, the judgment is binding upon us, and we must hold that the order giving leave to sign final judgment under Order XIV. was right. But if no authority had existed, I should have come to the same conclusion. An action on a judgment has been treated as an action of debt. It has been suggested, however, that a difference exists between English and foreign judgments, but in the present case the question is, whether the defendant can shew any defence to the claim made against him. Upon principle what difference can there be between an English and a foreign judgment in this respect? An action upon a foreign judgment may be treated as an action in either debt or assumpsit: the liability of the defendant arises upon the implied contract to pay the amount of the foreign judgment.

BAGGALLAY and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Stocken & Jupp.*
Solicitors for defendant: *West, King, Adams & Co.*

(1) E. B. & E. 884.

J. E. H.

1884
May 30.

[IN THE COURT OF APPEAL.]

HOLLINS *v.* VERNEY.

Easement—Prescription Act (2 & 3 *Wm.* 4, *c.* 71), *ss.* 2, 4, 5, 6—*Right to use Way for the Removal of Timber—User at long Intervals—"Enjoyment for full period of Twenty Years."*

In an action where a right of way was claimed under the Prescription Act (2 & 3 Wm. 4, c. 71), in respect of twenty years' user as of right, it appeared that the way had only been used by the party claiming it—the defendant—for the removal of wood cut upon an adjoining close. The wood was cut upon this close at intervals of several years; the last cutting having been in the year before the action was commenced, the one next previous twelve years before, and the next at another interval of twelve years. Between these intervals the road was occasionally stopped up, but the defendant used it as often as he wished while the wood was being cut:—

Held, that there had not been an uninterrupted enjoyment of the way for twenty years within the meaning of the Prescription Act, which did not apply to so discontinuous an easement as that claimed.

Judgment of the Queen's Bench Division (11 Q. B. D. 715) affirmed.

APPEAL by the defendant from the decision of Lord Coleridge, C.J., Denman and Manisty, JJ., whereby judgment was ordered to be entered for the plaintiff. (1)

The facts of the case are stated in the report of the proceedings before the Queen's Bench Division (1), and also are noticed in the judgment of this Court hereinafter set forth.

Feb. 19. *J. W. Mellor, Q.C.*, and *E. W. Garrett*, for the plaintiff.

Sir F. Herschell, S.G. (*J. C. Lawrance, Q.C.*, and *W. Graham*, with him), for the defendant.

In addition to the cases cited in the judgment, the following were mentioned in the course of the argument: *Dare* v. *Heathcote* (2); *Hanmer* v. *Chance* (3).

Cur. adv. vult.

(1) 11 Q. B. D. 715.
(2) 25 L. J. (Ex.) 245.
(3) 4 De G. J. & S. 626; 34 L. J. (Ch.) 413.

May 30. The judgment of the Court (Brett, M.R., Lindley and Bowen, L.JJ.), was now delivered by

LINDLEY, L.J. This was an appeal from the decision of the Divisional Court, reported in 11 Q. B. D. 715.

The action was for trespass on the plaintiff's land, and was commenced on the 16th of June, 1882. The defendant pleaded a right of way for carting timber and underwood from a wood of his own. It was conceded that the right of way claimed could not be established by immemorial prescription at common law, inasmuch as the right could be shewn to have originated in modern times. Nor was any attempt made to establish the right of way as a way of necessity, or as a way created or reserved by any grant, actual or presumed. The contention was that the case was brought within the Prescription Act (2 & 3 Wm. 4, c. 71), and that the evidence given at the trial in support of the right of way amounted to the proof required by that Act.

Some of the evidence given at the trial went to shew an actual user of the way every year for more than twenty-five years before action; and if this evidence had been reliable, the right of way would clearly have been established. But this part of the evidence was very conflicting and unsatisfactory, and the learned judge who tried the case has reported that if the jury meant to find a verdict for the defendant on this ground, such a verdict ought not to be allowed to stand.

There was, however, other evidence shewing that the timber on what was called the slope of the wood had been cut in the years 1851, 1852, and 1853, and again in the years 1866, 1867, and 1868, and again in the year before the action was commenced; and that in these years the timber cut was carted along the way in question as of right and without interruption, so that the plaintiff had in fact for the last thirty years used the way whenever he wanted to do so, although that happened to be only twice before the dispute arose. The evidence on this point was satisfactory; and if the jury found for the defendant on the ground that this limited user was proved, the learned judge reports that he is not dissatisfied with it. He, however, gave no judgment for either party.

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Under these circumstances the plaintiff obtained a rule to shew cause why the verdict should not be set aside and a new trial had. The defendant, on the other hand, asked the Court to give judgment for him upon a claim of a right of way restricted to carting timber cut on the slope of the wood. The Divisional Court, after hearing both sides, set aside the verdict and gave judgment for the plaintiff with nominal damages, and decided, in effect, that such a right as the defendant claimed cannot be established under the Prescription Act by such evidence of user as the defendant was compelled to rely upon.

The question thus raised is one of very considerable importance, and in substance is whether a right of way can be established under the Prescription Act (2 & 3 Wm. 4, c. 71), where on the one hand the right can only be proved to have been actually exercised for a period of over thirty years on what are substantially three occasions at intervals of twelve years; but where on the other hand the person claiming the right did not require to exercise it on any other occasion. The sections of the Prescription Act material for consideration, in order to determine the question thus raised, are:—First, the preamble; secondly, s. 2 relating to ways; thirdly, s. 4, relating to the computation of the periods mentioned in s. 2, and defining the meaning of "interruption;" fourthly, s. 5, relating to pleadings; and fifthly, s. 6, relating to presumptions. These various provisions must be read together, for they illustrate and explain each other. They shew, first, that in order to establish a right of way under the Act in question, it is necessary that the way shall have been actually enjoyed by some person claiming right thereto without interruption for the full period of twenty years; secondly, that this period is to be reckoned next before some suit or action wherein the right of way shall have been brought in question: see as to this *Richards* v. *Fry* (1); *Wright* v. *Williams* (2); *Ward* v. *Robins* (3); thirdly, that the expression "without interruption," means without such an interruption as is described in s. 4; fourthly, that no presumption is to be made in favour of any claim upon proof

(1) 7 A. & E. 698. (2) 1 M. & W. 77.
(3) 15 M. & W. 237.

of the exercise or enjoyment of the right of way claimed for any less period than the full period of twenty years mentioned in ss. 2 and 4. The meaning of "as of right," or "claiming as of right," will be found discussed in *Bright* v. *Walker* (1); *Tickle* v. *Brown* (2); and *Earl de la Warr* v. *Miles* (3); and it has been decided that enjoyment by permission (*Monmouth Canal Company* v. *Harford* (4)), contentious user (*Eaton* v. *Swansea Waterworks* (5)), enjoyment as owner or occupier of the servient tenement (*Battishill* v. *Reed* (6), and *Harbidge* v. *Warwick* (7)), are not enjoyments "as of right" within the statute. It is not, however, necessary to examine this point with any minuteness, as the right of way claimed in the present case may be taken as having been claimed "as of right" within the true meaning of ss. 2 and 5. It may also be taken that there has been no "interruption" of the right of way within the meaning of ss. 2 and 4. The words "without interruption" in s. 2, mean, as already stated, without such an interruption as is mentioned in s. 4. The words are not equivalent to "without cessation;" and, paradoxical as it may appear, it has been decided that an enjoyment for nineteen years and three-quarters is sufficient to establish a right to light under s. 3, although the enjoyment may have been in fact obstructed for the last three months of the full period of twenty years for which the light must be actually enjoyed, in order that a right to it may be acquired under the statute. This was decided in 1840, in *Flight* v. *Thomas* (8), both by the Exchequer Chamber and the House of Lords. The easement there in question was a continuous easement (light), and the non-enjoyment for part of the twenty years was due to actual obstruction and not to mere non-user. The case, however, shews that actual enjoyment for the full period of twenty years may be established by evidence which falls short of proving actual user for the whole of that period without any cessation. Common sense, moreover, is enough to shew that in order to establish a right of way under s. 2, it cannot be necessary to

(1) 1 Cr. M. & R. 211.
(2) 4 Ad. & E. 369.
(3) 17 Ch. D. 535.
(4) 1 Cr. M. & R. 614.
(5) 17 Q. B. 267.
(6) 18 C. B. 696.
(7) 3 Ex. 552.
(8) 11 A. & E. 688; 8 Cl. & Fin. 231.

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prove an actual continuous user of the way by day and by night for twenty years without any cessation whatever. Whatever fairly amounts to an actual enjoyment as of right of the way claimed for the full period of twenty years mentioned in s. 2, is sufficient. But it is obvious, and it has often been pointed out, that in the case of a discontinuous easement like a right of way, it is extremely difficult, if not impossible, to say exactly what cessations of actual user are, and what are not, consistent with such an actual enjoyment for the full period of twenty years as the statute requires to establish the right. The statute leaves this difficulty to be solved in each case as best it may; but some light is thrown on the subject by ss. 6 and 4. Sect. 6 prohibits the making of any presumption in favour of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period than those mentioned in the other sections of the Act. This section is addressed to presumptions as distinguished from legitimate inferences from facts. It is addressed to judges rather than to juries. It assumes proof of actual enjoyment for a less period than twenty years, and forbids any presumption being made simply from such short enjoyment in favour of an actual enjoyment for a longer period than that proved; but s. 6 does not forbid inferences from an enjoyment for a less period than twenty years and other circumstances, if there are any. Sects. 2 and 4 require proof of actual enjoyment for twenty years before action; s. 6 says that proof of actual enjoyment for less than twenty years before action will not do; but this after all throws little or no light on the continuity of user requisite to amount to proof of actual enjoyment for the period in question. This view of s. 6 is the same as that taken by the Court in *Carr* v. *Foster* (1), which will be alluded to again presently. Further light is thrown on what is meant by actual enjoyment for the full period of twenty years by looking at the matter from the point of view of the owner of the servient tenement. A right of way cannot be actually enjoyed by one person without being permitted or suffered by the owner of the land, over which the way is enjoyed; and if the one must actually enjoy it for the full period of twenty years, the other must actually suffer it for the same period. Moreover, as

(1) 3 Q. B. 581.

the enjoyment must be as of right and without interruption for the full period of twenty years, it follows that for the same period there must have been an opportunity of resistance and interruption. Upon this principle it has been held that easements the enjoyment of which cannot be prevented, cannot be acquired. Thus, in *Webb* v. *Bird* (1) it was held that the owner of a windmill cannot gain by prescription a right to the free passage of wind to his mill. In *Sturges* v. *Bridgman* (2) it was held that a person could not gain by prescription a right to make a noise which for many years affected no one, and which no one therefore could have prevented him from making. Similar reasoning from s. 4 has induced some judges to say that some user must be proved in each year of the period mentioned in the statute. See *Lowe* v. *Carpenter* (3). Looking, from this point of view, at a right of way exercised only at long intervals of time, it is difficult to see how its exercise can be interrupted or resisted except at those times when it is exercised. If it cannot be interrupted or resisted during the full period of twenty years, it is difficult to see how it can be actually enjoyed for such period "as of right" and "without interruption," as required by s. 2 of the statute. The difficulty, however, of distinguishing between long and short intervals of enjoyment is not removed by such reasoning. The difference is one of degree rather one of principle, and the statute does not afford any certain test whereby the difficulty can be solved. The truth is that the question whether in any particular case a right of way has, or has not, been actually enjoyed for the full period of twenty years, appears to be left by the Act to be treated as a question of fact to be decided by a jury, unless the Court sees that having regard to s. 6 and the other provisions of the statute there is no evidence on which the jury can properly find such enjoyment. This view of the statute will explain several decisions which are apparently conflicting, and which it is necessary to notice.

In *Lawson* v. *Langley* (4), decided in 1836, a right of way was claimed under s. 2 of the statute. Enjoyment for the full period of forty years was pleaded and sought to be proved. There

(1) 10 C. B. (N.S.) 268.
(2) 11 Ch. D. 852.
(3) 6 Ex. 825.
(4) 4 A. & E. 890.

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appears to have been some difficulty in proving actual user for the whole period; and evidence was tendered to shew a user of the way more than forty years ago. The evidence was rejected at the trial, but a new trial was ordered on the ground that the evidence ought to have been received. The Court evidently thought the evidence admissible for the purpose of enabling the jury to draw an inference of fact, notwithstanding the rule in s. 6 against presumptions. Littledale, J., said (p. 891): "If evidence of user beyond forty years were to be excluded, it might be that after the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to two or three preceding years, and the party might fail, because he was unable to carry his case on without going to the distance of forty-one." In *Hall* v. *Swift* (1), decided in 1838, a watercourse was claimed. The claim was apparently made under s. 2 of the Act. Enjoyment for the last nineteen years was proved, but for three years before that the water had not flowed in its accustomed course. Before those three years, however, enjoyment for some time was proved. The report says there had been some interruption about twenty-two years before the action; but it is tolerably plain that there had been no interruption within the meaning of s. 4 of the Act, and that the interruption spoken of was only a cessation in the flow of water. The jury found in favour of the right claimed. An application was made to set aside the verdict on the ground (amongst others) that actual enjoyment for the full period of twenty years before action had not been proved. The Court, however, refused to interfere, Tindal, C.J., saying: "It would be very dangerous to hold that a party should lose his right in consequence of such an interruption; if such were the rule, the accident of a dry season or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment." This last remark seems to go rather too far; for under the statute the right is not acquired until it has been enjoyed for the requisite period, and if an immemorial, as distinguished from a twenty years' statutory, enjoyment can be proved, the right will be established independently of the statute, and will not be lost by a mere temporary non-

(1) 4 Bing. N. C. 381; 7 L. J. (C. P.) 209.

enjoyment. These two cases, however, seem to establish that if user before the statutory period is proved and user for eighteen or nineteen years next before action is also proved, the mere fact of non-user for some time immediately after the commencement of the statutory period is not necessarily fatal; and this we consider good law, if the non-user is capable of explanation consistently with continued actual enjoyment as of right.

Bailey v. *Appleyard* (1) is supposed to be inconsistent with this view, but it is not really so, as will be seen by reading with the report of the case the note explaining it. This note is to be found between pp. 778 and 779 in some copies of 8 A. & E., being misplaced in binding. In *Bailey* v. *Appleyard* (1) a right of common was claimed under s. 1. Enjoyment for twenty-eight years before action was proved; for much more than two years before that there had been an actual obstruction of the right by means of a stang or bar. Before its erection, however, enjoyment was proved for some years. The judge asked the jury whether the stang or bar had prevented the plaintiff from exercising his right, and told them that if it had, the proof of prior enjoyment would not assist him; and it was left to the jury to say whether there had been substantially an enjoyment for thirty years or for twenty-eight years only. The jury found for the defendant, i.e., against the right of common, and the Court held there was no misdirection. It is manifest that the verdict was right, and that the decision of the Court was correct, for actual enjoyment as of right for thirty years next before action was disproved, and could not be inferred in the face of the evidence as to the obstruction. In the course of the argument Patteson, J., expressed an opinion "that the most undoubted exercise of enjoyment for twenty-nine and three-quarter years would not have been sufficient." But this was before *Flight* v. *Thomas* (2) had been decided, and must not be taken as literally true in all cases.

In *Parker* v. *Mitchell* (3), decided in 1840, a claim was made to a right of way under s. 2, and both a forty and a twenty years' user were pleaded. The evidence shewed a user from a period of fifty years before action, but not for the last four or five years.

(1) 8 A. & E. 161. (2) 11 A. & E. 688; 8 Cl. & F. 231.
(3) 11 A. & E. 788.

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What the explanation of this was, does not appear. The judge at the trial was of opinion that the claim was not supported, and by his direction the jury found against it, but the evidence on the user was not left to them. The Court refused a rule for a new trial, evidently on the ground that on the undisputed facts the jury could not properly find an actual enjoyment for the full period of twenty or forty years next before the commencement of the action, as required by ss. 2 and 4 of the statute (see per Patteson, J., in 3 Q. B. 585). This decision seems right in the absence of all explanation accounting for the non-user.

In *Carr* v. *Foster* (1), decided in 1842, the plaintiff claimed a right of common of pasture. He proved enjoyment for forty years next before action, with the exception of an interval of two years, which occurred eighteen years back, and was accounted for by the fact that his predecessor in title had then no commonable beasts. The plaintiff at the trial seems to have relied on the statute, and not on any title he might have acquired independently of the statute; and the case was dealt with both at the trial and by the Court afterwards as turning on the provisions of the statute. The judge at the trial asked the jury whether substantially the right of common had been enjoyed for thirty years next before the action, and the jury found for the plaintiff. A rule was obtained to shew cause why a nonsuit should not be entered or a new trial had on the ground that the verdict was against the weight of evidence; but on argument the rule was discharged, because there had been no interruption within the meaning of s. 4, and the cessation of enjoyment was accounted for in such a way as to justify an inference, that the right was actually enjoyed for the full period required by the Act, although there was in fact an intermission of enjoyment for two years, part of that period. This case certainly goes further than any other to be found in the books; but we are not prepared to say it was wrongly decided, nor to hold that the case ought not to have been left to the jury, considering the explanation given of the non-user. At the same time it is difficult to reconcile this case with *Parker* v. *Mitchell* (2), and with those cases already referred to in which it has been held that a way actually used for twenty

(1) 3 Q. B. 581. (2) 11 A. & E. 788.

years before action has not been enjoyed for those twenty years as of right, if for any part of that period the dominant and servient tenements have been occupied together. In the one case there has been a total cessation of user for a time, and in the other there has been no cessation of user at all, but only a cessation of user as of right. Why a temporary cessation of user as of right should be more fatal to the acquisition of the right than a total temporary cessation of user, it is not easy to see.

The next and last case to which it is necessary to refer is *Lowe* v. *Carpenter* (1) decided in 1851. The defendant there claimed a right of way under s. 2 of the statute. He proved user for forty-eight years before action with the exception of the last fourteen months, when it did not appear to be used at all. It also appeared that the way was not used every year, but only as occasion required—for carting timber, lime, &c., as occasion required: whether this was the reason why the way was not used for the last fourteen months, is not stated. The case was tried before Patteson, J., who was one of the judges who had decided both *Parker* v. *Mitchell* (2) and *Carr* v. *Foster*. (3) He expressed himself not altogether satisfied with *Parker* v. *Mitchell* (2), and under his direction the jury found for the defendant, i.e., in favour of the right claimed, leave being reserved to the plaintiff to move to set aside that verdict and to enter a verdict for himself with nominal damages. The plaintiff obtained a rule accordingly, and upon argument the Court decided in his favour. The Court considered *Parker* v. *Mitchell* (2) rightly decided, and that the jury could not upon the evidence find an actual enjoyment for the full period of twenty years next before the commencement of the action, as required by ss. 2 and 4 of the statute. Parke, B., expressed an opinion that proof of some user every year was essential to bring a case within the statute, and he referred to s. 4 in support of that opinion. But at present there is no decision which goes this length; and we are not prepared to say that an actual enjoyment for the full period required by the statute may not be inferred, although there is no proof of actual user in every year. We think that, notwithstanding the rule against presumptions in s. 6, if a user for more than twenty or thirty years, as the case may be, is

(1) 6 Ex. 825. (2) 11 A & E. 788. (3) 3 Q. B. 581.

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proved, a non-user for more than a year within twenty or thirty years from the commencement of the action may be so explained as to warrant a jury in finding an actual enjoyment for the statutory period, as the jury in fact did in *Carr* v. *Foster*. (1) The observations of James, L.J., in 17 Ch. D. 600, shew that this also was his opinion; at the same time the total absence of user for any year of the statutory period will be fatal, unless explained in such a way as to warrant the inference of continued actual enjoyment notwithstanding such temporary non-user. We confess, however, that we do not appreciate the supposed distinction between a temporary non-user for a year occurring at the beginning, or the end, or in the middle of the statutory period. *Flight* v. *Thomas* (2) and the language of s. 4 shew that an interruption for a year is fatal, and that an interruption for less than a year is not fatal whether it occurs at the commencement, or end, or at any part of the statutory period; so a cessation of user which excludes an inference of actual enjoyment as of right for the full statutory period will be fatal at whatsoever portion of the period the cessation occurs; and, on the other hand, a cessation of user which does not exclude such inference, is not fatal, even although it occurs at the beginning, or the end of, the period. The only difference is that if the non-user occurs at the end of the period there can be no subsequent user to explain it, and the inference of actual enjoyment for the full period next before action is more difficult to draw than in other cases. But we are not prepared to say that as a matter of law such an inference can in no case be drawn. On the contrary, we think it may where s. 6 does not apply. In *Parker* v. *Mitchell* (3) and *Lowe* v. *Carpenter* (4) the non-user at the end of the period was apparently unexplained, and was therefore fatal. In *Bailey* v. *Appleyard* (5) the non-user at the beginning of the period was owing to actual obstruction, which was fatal; but, as already pointed out, *Hall* v. *Swift* (6) and *Lawson* v. *Langley* (7) shew that non-user at the commence- of the period is not necessarily inconsistent with the actual enjoyment for the full statutory period, and *Carr* v. *Foster* (1) shews that

(1) 3 Q. B. 581.
(2) 11 A. & E. 688; 8 Cl. & F. 231.
(3) 11 A. & E. 788.
(4) 6 Ex. 825.
(5) 8 A. & E. 161.
(6) 4 Bing. N. C. 381; 7 L. J. (C.P.) 209.
(7) 4 A. & E. 890.

the same is true of a temporary cessation in the middle of the period. We have examined a great number of other decisions upon the Prescription Act, all indeed that we have been able to find, but none of them except those to which we have referred appear to require comment for the purpose of deciding the case before us. It is difficult, if not impossible, to enunciate a principle which will reconcile all the decisions, and still more all the dicta to be found in them; the only safe course is to fall back on the language of the statute, to give effect to it, and to introduce into it nothing which is not to be found there. It is sufficient for the present case to observe that the statute expressly requires actual enjoyment as of right for the full period of twenty years before action. No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended. Can an user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised, satisfy even this test? It seems to us that it cannot: that it is not, and could not reasonably be treated as the assertion of a continuous right to enjoy; and when there is no assertion by conduct of a continuous right to enjoy, it appears to us that there cannot be an actual enjoyment within the meaning of the statute. Without therefore professing to be able to draw the line sharply between long and short periods of non-user, without holding that non-user for a year or even more is necessarily fatal in all cases, without attempting to define that which the statute has left indefinite, we are of opinion that no jury can properly find that the right claimed by the defendant in this case has been established by evidence of such limited user as was mainly relied upon, and as was contended by the defendant to be sufficient in the present

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case. Upon this point, therefore, we affirm the decision of the Divisional Court; and, as the defendant has failed both here and in the Divisional Court on the point of law on which he relied for his defence, he ought in our opinion to pay the costs of the appeal and of the motion made to the Divisional Court.

This, however, does not quite dispose of the case. The jury found in favour of the defendant; and he gave some evidence of having carried timber from other parts of his wood along the road in question in several years besides in 1851–3, 1866–9, and just before the action. This evidence was not satisfactory, and there was a considerable amount of evidence on the other side shewing that the user was by permission and not "as of right," and Cave, J., thought that the verdict ought not to stand unless the defendant was right in his legal contention. At the same time we are not prepared to say that the verdict can be set aside and judgment entered for the plaintiff. The Divisional Court have, however, gone that length. They apparently considered that there was no evidence of user, except in the years 1851–3 and 1866–9, and if this had been the case their judgment would have been quite right. But there was some evidence, though unsatisfactory evidence, of more frequent user than in those years; and although, now that the main point on which the defendant relied throughout is decided against him, the verdict in his favour cannot stand, we think he is entitled to a new trial if he desires it, and the judgment of the Court below must be varied accordingly. But it will be useless for the defendant to go down to trial again unless he is prepared with satisfactory evidence of a much more continuous user as of right than he relied upon before. If he elects to try the case again, the costs of the action and of the new trial will abide the event. If he does not try the case again, he must pay the costs of the action, and in any event he must pay the costs of the motion to the Divisional Court and of this appeal, as already stated.

Judgment varied.

Solicitors for plaintiff: *Field, Roscoe, & Co.*
Solicitors for defendant: *Geare, Son, & Pease.*

J. E. H.

[IN THE COURT OF APPEAL.]

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Jan. 31.

GULLISCHEN *v.* STEWART BROTHERS.

Ship—Charterparty—Cesser Clause—Bill of Lading—Incorporation of Conditions of Charterparty in Bill of Lading.

A charterparty contained stipulations in the usual form for payment of freight and demurrage, and also a stipulation that "as this charterparty is entered into by the charterers on account of another party, their liability ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage." The charterers having placed the cargo on board at the port of loading, a bill of lading was signed whereby the goods were made deliverable to themselves at the port of discharge, "they paying freight, and all other conditions as per charterparty." In an action by the shipowner against them, as consignees of the cargo, for demurrage in respect of delay at the port of discharge:—

Held, that the cesser clause in the charterparty must be rejected as inapplicable in reading the bill of lading, which incorporated all the conditions of the charterparty applicable to the reception of the goods at the port of discharge, and therefore that the plaintiff was entitled to maintain the action.

Judgment of the Queen's Bench Division (11 Q. B. D. 186) affirmed.

APPEAL by the defendants from the judgment of Pollock, B., and Lopes, J., on a special case.

The facts of the case are fully stated in the report of the proceedings before the Queen's Bench Division (1), and also may be gathered from the above head-note.

Jan. 30, 31. *Edwyn Jones*, for the defendants. The cesser clause in the charterparty enured for the benefit of the charterers at the port of discharge. By virtue of that clause the charterers' liability ceased on the cargo being put on board at the port of loading when the bills of lading were signed by the captain, who then had his lien on the cargo for freight and demurrage. The defendants were charterers as well as consignees, and their liability as charterers having ceased they were not liable; for their only liability as consignees of the goods would be to pay freight on receiving them, if it were not for the reference in the bills of lading to the conditions in the charterparty, and such

(1) 11 Q. B. D. 186.

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reference would incorporate all the terms of the charterparty, including the cesser clause, as well as the other conditions. The fact, that the defendants are consignees as well as charterers, does not defeat the operation of the cesser clause: *Sanguinetti* v. *Pacific Steam Navigation Co.* (1); and the parties to the maritime adventure are bound by the language which they have used: *Porteus* v. *Watney.* (2)

Synnott (*French*, with him), for the plaintiff, was not called upon to argue.

LORD COLERIDGE, C.J. This is a perfectly clear case. By the terms of the bill of lading the consignees were to pay freight, and all other conditions were to be as per charterparty. There is, therefore, an express contract to incorporate the stipulations of the charterparty: the result is the same, as if the words of the charterparty were written into the bill of lading. It has been contended that the condition for the cesser of the charterers' liability is in force, and that it makes no difference that the consignees and the charterers are the same persons; but those words are incorporated which are consistent with the liabilities arising upon the bill of lading, and not those which are inconsistent: one condition (which is not in that sense inconsistent,) is incorporated, namely, that the consignees shall pay demurrage at the stipulated rate if the ship is detained longer than the agreed time. The judgment of the Queen's Bench Division was right, and must be affirmed.

BRETT, M.R. In all probability the defendants would be liable for demurrage upon the charterparty, if it had contained no clause for cesser of liability; but that clause is inserted, and their liability would have ceased, if they had done nothing but load the ship. They took, however, two sets of bills of lading. The contract by a bill of lading is different from a contract by a charterparty, and the defendants are sued upon the contract contained in the bill of lading. It would be absurd to suppose that their liability upon the bills of lading would cease upon the

(1) 2 Q. B. D. 238. (2) 3 Q. B. D. 534.

loading of the cargo. What is their liability upon the bills of lading? It is to pay freight and other conditions "as per charterparty." Upon the terms of the charterparty the consignees were to pay demurrage at a certain rate: that is a condition which is incorporated in the bill of lading. But the clause as to the cesser of the charterers' liability is not incorporated. Pushed to its logical conclusion, the argument for the defendants would free them from liability for freight; but the contracts in the charterparty and in the bill of lading are consistent as to demurrage. The judgment of the Queen's Bench Division is right.

BOWEN, L.J. I am of the same opinion. The bill of lading by its words incorporates the terms of the charterparty; but these words must receive a reasonable construction. The result is that the bill of lading incorporates certain provisions of the charterparty, but not the clause as to cesser of liability. The argument for the defendants would render the bill of lading a nullity: it would be a useless form except as an acknowledgment that the goods had been put on board. The bill of lading is a document regulating the rights and liabilities of the consignees; only those clauses of the charterparty which are consistent with its character as a bill of lading are incorporated in it.

Judgment affirmed.

Solicitors for plaintiff: *Venn & Co., for Collins, Robinson, & Co., Liverpool.*

Solicitors for defendants: *Kearsey, Son, & Hawes.*

J. E. H.

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Dec. 21.

[IN THE COURT OF APPEAL.]

THE GREAT NORTHERN RAILWAY COMPANY *v.* TAHOURDIN AND ANOTHER.

Railway Company — Dock Company—Railway ancillary to Docks—"Company"—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *ss.* 3, 4.

The protection against seizure in execution afforded by the Railway Companies Act, 1867, ss. 3, 4, applies to the railway plant of every company constituted by a statute for the purpose of constructing or working a railway, even although the railway is merely a subordinate and ancillary part of the undertaking authorized by the statute.

By two local statutes a company was authorized to construct a wet dock, a lock forming an entrance to the dock, and two short railways, each about half a mile long, to connect the dock with other railways. The plaintiffs had lent money to the company upon mortgage-debentures. The defendants were creditors of the company, and having obtained judgment seized in execution certain railway plant belonging to it. The plaintiffs having brought an action for an injunction to prevent the defendants from realising their execution:—

Held, that the dock company was a "company" within the Railway Companies Act, 1867, s. 3, and that the railway plant belonging to it was protected from seizure by s. 4.

THE Sutton Bridge Dock Act, 1875 (38 & 39 Vict. c. ccvii.) recited by its preamble that "the making and maintaining of a dock and other works on the river Nene at Sutton Bridge in the parish of Sutton St. Mary, in the parts of Holland in the county of Lincoln, with a short line of railway to connect the dock with the railways at Sutton Bridge, would be of public and local advantage." By s. 2, the Railways Clauses Consolidation Act, 1845, and part 1 (relating to the construction of a railway) of the Railways Clauses Act, 1863, were incorporated. By s. 5, certain persons were constituted a company which was incorporated by the name of "the Sutton Bridge Dock Company." By s. 6, the company was authorized to make and maintain—(1): "a wet dock to be constructed in lands adjoining and near to the bank of the river Nene;" (2), "a cut or lock forming an entrance to the dock;" (3), "a short line of railway, three furlongs eight chains in length, commencing by a junction with the goods lines at the Sutton

Bridge Railway Station." By s. 26, the company was authorized to borrow on mortgage any sum not exceeding in the whole 33,300*l*. By the Sutton Bridge Dock Act, 1876 (39 & 40 Vict. c. lxxxviii.), s. 4, the Sutton Bridge Dock Company was authorized to make and maintain "a railway four furlongs six chains in length wholly situate in the parish of Sutton St. Mary, in the parts of Holland in the county of Lincoln, commencing by a junction with the Norwich and Spalding Railway, and terminating on the western side of the company's dock authorized by 'the Sutton Bridge Dock Company's Act, 1875.'" The plaintiffs, the Great Northern Railway Company, had lent to the Sutton Bridge Dock Company many thousands of pounds on mortgage-debentures of the undertaking of that company in the form given by the Companies Clauses Consolidation Act, 1845.

The defendants, Tahourdin & Hargreaves, were solicitors, and had acted for the Sutton Bridge Dock Company, and their bill of of costs having remained unpaid, they obtained judgment in an action for the amount thereof and issued a writ of fieri facias. Under this writ the sheriff seized certain chattels in the possession and on the premises of the Sutton Bridge Dock Company, namely, a hydraulic lift used for the purpose of "tipping" the contents of trucks upon the railway into vessels lying in the dock, some moveable cranes, and a fixed engine, used for the purpose of giving power to the hydraulic lift and to the moveable cranes.

The plaintiffs, the Great Northern Railway Company, thereupon commenced an action for an injunction, and an order was made ex parte restraining the defendants from proceeding to remove or sell the chattels seized by them in execution in the action brought by them against the Sutton Bridge Dock Company until the trial of this action or further order. The defendants having moved to dissolve the injunction, their application was dismissed by the Queen's Bench Division. The defendants then appealed to this Court, but upon the hearing of the appeal it was agreed between the parties that the order of the Queen's Bench Division should be treated as a decree for a perpetual injunction, and the hearing was adjourned in order that the case might be argued upon that footing.

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The argument was resumed on

Dec. 10, 11. *Waddy Q.C.*, and *Shiress Will*, for the defendants. The question is whether the chattels seized in execution by the defendants under their judgment against the Sutton Bridge Dock Company are protected from execution by s. 4 of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127). That section does not apply. The "company," whose property is protected from execution by that section, is defined by s. 3 to mean "a railway company; that is to say a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining, or working a railway (either alone or in conjunction with any other purpose)." This Sutton Bridge Dock Company is a dock company and not a railway company within the meaning of 30 & 31 Vict. c. 127, and the mere fact that they were empowered to make two railways to connect their docks with some other railways does not turn the dock company into a railway company, any more than a railway company would be converted into an hotel company by constructing an hotel at the terminus of their railway. The railways were here ancillary to the dock, and merely a subordinate part of the dock company's works, and are like the railway in *In re Exmouth Docks Co.* (1) There a dock company was held not to be a railway company so as to come within the exception from winding-up companies given by s. 199 of the Companies Act, 1862, by reason of its having power to make a branch railway for purposes connected with the docks. That is a decision directly in point for the defendants. Next, even if this company was a railway company within the meaning of 30 & 31 Vict. c. 127, what the defendants have seized formed only dock plant and not rolling stock or plant of the company for the purpose of traffic on the railway, and therefore was not protected.

R. T. Reid, Q.C., and *Cyril Dodd*, for the plaintiffs, cited *Midland Wagon Co.* v. *Potteries Ry. Co.* (2), and were stopped in their argument as to whether the Sutton Bridge Dock Company was a "company" within the meaning of the Railways Companies Act,

(1) Law Rep. 17 Eq. 181. (2) 6 Q. B. D. 36.

1867, s. 3. The chattels seized by the sheriff are railway plant, and cannot be taken in execution. (1)

Shiress Will, in reply.

Cur. adv. vult.

Dec. 21. The following judgments were delivered:—

BRETT, M.R. In this case an interlocutory order had been obtained against the defendants by the plaintiffs, and thereupon a motion was made in the Queen's Bench Division to set aside the injunction. The Divisional Court refused to do so; thereupon an appeal was brought to this Court; but for the benefit of all parties it was agreed that the order of the Divisional Court should be treated as a decree for a perpetual injunction, and that the appeal to this Court should be considered, as an appeal against an order for a perpetual injunction.

The defendants were execution-creditors upon a judgment obtained against a company called the Sutton Bridge Dock Company. The plaintiffs were the holders of certain instruments, by which the undertaking of the Sutton Bridge Dock Company was mortgaged to them. One point in dispute was whether the Sutton Bridge Dock Company was a "company" within the

(1) The counsel for the plaintiffs also contended that the plaintiffs were mortgagees of the chattels seized, that the property therein had passed to them, and that the defendants as execution creditors, could not at common law seize chattels belonging to the plaintiffs by a fieri facias issued upon a judgment against the Sutton Bridge Dock Company; and further that under 30 & 31 Vict. c. 127, s. 23, the plaintiffs being the mortgagees of the undertaking, and therefore having an equitable charge upon the chattels seized, had priority over the defendants as execution creditors. As to these points the following authorities were cited: *Russell* v. *East Anglian Ry. Co.* (3 Mac. & G. 125); *Legg* v. *Mathieson* (2 Giff. 71); *Wildy* v. *Mid-Hants Ry. Co.* (16 W. R. 409); *In re Manchester and Milford Ry. Co.* (14 Ch. D. 645); *In re Panama, New Zealand, and Australian Royal Mail Co.* (Law Rep. 5 Ch. 318); *In re New Clydach Sheet and Bar Iron Co.* (Law Rep. 6 Eq. 514); *In re Florence Land and Public Works Co.* (10 Ch. D. 530); *Yorkshire Railway Wagon Co.* v. *Maclure* (21 Ch. D. 309); *Furness* v. *Caterham Ry. Co.* (27 Beav. 358); *Moor* v. *Anglo-Italian Bank* (10 Ch. D. 681); *National Mercantile Bank* v. *Hampson* (5 Q. B. D. 177); *Taylor* v. *M'Keand* (5 C. P. D. 358); *Payne* v. *Fern* (6 Q. B. D. 620). But as the Court gave no judgment upon these points, the arguments as to them are omitted.

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Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 3, and if it was, whether the chattels seized were part of the plant of a railway so as to be protected from seizure by execution-creditors within the 4th section of that statute. The plaintiffs must be treated as having an interest in the chattels seized sufficient to entitle them to apply for an injunction, and after having taken time to consider the facts, I am of opinion that the judgment of the Divisional Court was right.

No doubt the Sutton Bridge Dock Company was mainly a dock company; but the Acts of Parliament under which the company was constituted, gave power to make not only a dock, but also railways for the purposes of that dock, that is to say, railways which at one end were joined on to a system of railways, but which came down to the place where ships would lie in that dock. It was urged that the railways were ancillary to the dock, and therefore that the company was only a dock company and not a railway company. I do not find the word "ancillary" occurring in the definition of a "company" given in 30 & 31 Vict. c. 127, s. 3, that definition being "a railway company, that is to say, a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining, or working a railway (either alone or in conjunction with any other purpose)." I will assume that the railway made under the powers of the Acts is ancillary to the docks; nevertheless the company was constituted for the purpose of constructing, maintaining, or working an ancillary railway, in conjunction with another purpose, that is, with the purpose of making and maintaining a dock. The word "ancillary" does not take the company out of the definition. Even although the railway is "ancillary," it is a railway made in conjunction with a dock within the meaning of the parliamentary definition. The operation of the statute cannot be defeated by importing into it an epithet. Although the Sutton Bridge Dock Company was not a railway company in the ordinary sense of the term, it was a "company" within s. 3 of the Railways Companies Act, 1867.

As to the chattels seized, I am of opinion that they all are

the plant of a railway company within the meaning of s. 4, and therefore that they are protected against the execution by the defendants, the plaintiffs having a sufficient interest to maintain an action for an injunction. I think that there must be a perpetual injunction against the defendants to prevent them from realising their execution against these chattels.

BAGGALLAY, L.J. I am of the same opinion. In order to ascertain whether the Sutton Bridge Dock Company is a "company" within the meaning of s. 4 of the Railway Companies Act, 1867, we must refer to the interpretation clause, s. 3, and we must consider whether this is a company constituted "for the purpose of constructing, maintaining, or working a railway (either alone or in conjunction with any other purpose.)" I think that we have only to look at the Act of 1875, and the extending Act of 1876, to see that the Sutton Bridge Dock Company comes entirely within that definition. The preamble of the earlier Act states that the construction of a dock and other works with a line of railway connected with the dock would be of public and local advantage. We are then told in the 6th section of the same Act what the purposes of the legislature are: first, the construction of a wet dock; secondly, the construction of a cut or lock forming an entrance to the dock; and, thirdly, a short line of railway. The extending Act of 1876 provides for the construction of another short line of railway, about half a mile long. It appears to me to be impossible to come to any other conclusion than that this is a company within the definition of the Railway Companies Act, 1867, s. 3.

I agree that the chattels seized were used for the purposes of traffic upon the railway, and are not liable to seizure.

BOWEN, L.J., concurred.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Nelson, Barr, & Nelson.*
Solicitors for defendants: *Tahourdins & Hargreaves.*

J. E. H.

1883
Dec. 21.

[IN THE COURT OF APPEAL.]

ASTE, SON, & KERCHEVAL *v.* STUMORE, WESTON, & CO.

Practice—Interrogatories—Deposit—Discretion of Judge—Rules of Supreme Court, 1883, *Order XXXI., rr.* 25, 26.

A party to a cause is not entitled to obtain as a matter of right an order to administer interrogatories without making a deposit under Rules of the Supreme Court, Order XXXI., rules 25, 26, merely because the other party consents to it. The judge at chambers has upon an application of that kind a discretion, and in the exercise of that discretion may order the deposit to be made, notwithstanding that the party to be interrogated is ready to dispense with a deposit.

THIS action was brought by the plaintiffs to recover the sum of 100*l.* for dock charges paid by the plaintiffs under protest. An application was made by the plaintiffs for directions before a master, and upon the summons the plaintiffs asked for leave to administer interrogatories to the defendants, and they also asked that the defendants should file an affidavit of documents; they also asked that an order should be made without compelling them to give security. Upon this application the defendants also asked that they likewise might have an order for discovery as against the plaintiffs without security. The master made an order for mutual interrogatories and mutual discovery upon security being given. Against this decision the plaintiffs, and practically also the defendants, appealed to Field, J., sitting as the judge in chambers. The learned judge was informed that the ground for applying to dispense with the deposit was, that the defendants consented to waive it. Field, J., considered this ground insufficient, and refused to make an order. The plaintiffs thereupon appealed to the Queen's Bench Division, and the case came on before Lord Coleridge, C.J., Stephen, and Mathew, JJ.; these learned judges unanimously dismissed the appeal, holding that under Rules of the Supreme Court, 1883, Order XXXI., rule 26, they had no discretion to dispense with the deposit, that rule being absolute in its terms. The plaintiffs then appealed to this Court. The plaintiffs were a very substantial and respectable firm, and the defendants were large shipowners in the City of London.

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L. E. Pike, for the plaintiffs. Under rules of the Supreme Court, 1883, Order XXXI., rules 25, 26, the Court or a judge has power to exercise a discretion. In *Burr* v. *Hubbard* (1) Field, J. gave leave to administer interrogatories without making any deposit. Rules 25, 26 must be read together, and it is provided in rule 25 that the costs of discovery need not be secured as provided in rule 26 if a judge "otherwise" orders. In the present case Field, J., followed his ruling in *J. & E. Hall* v. *Liardet* (2); but this ruling was erroneous. Each of the parties to the present action is desirous of administering interrogatories and obtaining discovery, and neither party desires a deposit. Formerly, no doubt, an abuse existed as to interrogatories; but now except in cases of fraud or breach of trust they cannot be administered without leave: Order XXXI., rule 1. A further check upon the improper administration of interrogatories is introduced by rule 3, which provides that if interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the interrogatories and the answers thereto shall be paid by the party in fault. The object of rules 25, 26 was that where one party desires to have written evidence and is not content with vivâ voce evidence, he must, at least in the first instance, pay for it; but the party, for whose benefit the rule has been enacted, ought to be allowed to dispense with it. If the ruling of either the Queen's Bench Division or Field, J., be upheld, the result will be that where both parties assent, interrogatories will be exchanged between the parties and admissions will be obtained, and yet the costs of the litigation will not be lessened. To state the argument for the plaintiffs in a few words, a party who wishes to get an order to administer interrogatories without a deposit, need only obtain the consent of the opposite party; for every person may dispense with a right created for his benefit.

Gorell Barnes, for the defendants. The defendants are equally desirous with the plaintiffs that an order should be made dispensing with security. Perhaps the true remedy for any abuse of the power of obtaining discovery is contained in Rules of the Supreme Court, 1883, Order LXV., rule 5, which provides that

(1) W. N. (1883), 198. (2) W. N. (1883), 176.

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under some circumstances at least the solicitors in the cause may be ordered personally to pay costs.

BRETT, M.R. In this case, on behalf of wealthy clients, application was made to Field, J., on appeal from a master, for an order to administer interrogatories without the necessity of depositing the sum of 5*l*. That learned judge inquired upon what grounds leave to dispense with the deposit was asked for; he was informed that the defendants assented to the order in the form proposed by the plaintiffs; he considered that this ground was insufficient, and refused to make an order. The plaintiffs appealed to the Queen's Bench Division: there it was held that not only was consent insufficient as a ground for dispensing with the deposit, but that under Order XXXI., rules 25, 26, the Court had no discretion. An appeal has been brought to this Court for the purpose of ascertaining whether wealthy gentlemen should be allowed to administer interrogatories without a deposit. The appellants' counsel argued against the decision of the Court below, that by reason of the consent of the opposite party, the discretion of the judge was absolutely done away with. This argument was fortified by suggestions as to what would happen, if the decision of the Queen's Bench Division were upheld; it was intimated that interrogatories would be delivered between the parties without an order and without a deposit, and that they would not go before a Master or a judge at chambers. Then the respondents' counsel wanted to be relieved from the necessity of making a deposit, and he said that he wished to support the argument by the appellants' counsel; he said that as each side was rich, the order ought to be made against him. But we must not forget those cases in which the parties are not rich. There may be some solicitors who, with a view to costs, will advise their clients to do certain things, such as to administer interrogatories; how can their clients, the parties litigant, know whether it is advisable to administer interrogatories? If the arguments adduced before us are correct, it will be sufficient for these solicitors to inform the judge that the opponents of their clients have personally consented to a waiver of the deposit. Under the Supreme Court of Judicature Acts, 1873, 1875, inter-

rogatories were freely administered, and caused great and useless expenditure; in the great majority of cases the answers were not read at the trial, and the burthen to poor litigants was very heavy. It became the practice to draw voluminous interrogatories, and this circumstance alone caused great costs to be incurred. The Rules of the Supreme Court, 1883, were made by the judges, and what I understand the view of the Rule Committee to have been is, that they ought to protect the parties litigant against themselves, even although it should be said that they consented to interrogatories such as I have mentioned. It was considered that a gross abuse existed which ought to be checked. When this case was before the Queen's Bench Division, it was said that the rules were not elastic, and that a judge at chambers had no discretion, but was bound to order a deposit to be made. It is unnecessary to decide the point, but as at present advised, I do not agree with the view of the learned judges in the Queen's Bench Division. I have a strong opinion upon this point, although I do not decide it; for if a discretion is given by rule 25, it seems difficult to suppose that it can be taken away by anything to be found in rule 26. I agree with what Field, J. is reported to have said in *J. & E. Hall* v. *Liardet* (1). Can we say that Field, J. was wrong? The proposition is that upon consent of the opposite party the judge is bound to dispense with the deposit: I am most clear that the judge is not bound to do so. Consent does not prevent the judge from exercising his discretion; and if I were sitting at Chambers, I should look narrowly into the circumstances whenever consent was relied upon; it would make me feel suspicious that something was wrong as to the conduct of the cause. The deposit was intended for the protection of the clients themselves. I am of opinion that the view of Field, J., was right.

BOWEN, L.J. This is a very important case to the poorer class of litigants. Before the Judicature Acts on one side of the law was the system of Chancery which had applied the principles of discovery very widely. Upon the other side was the common law with commercial cases between rich litigants; and there were also

(1) W. N. (1883), 176.

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proprietary causes which arose between rich people; besides these, there was a smaller class of litigation, much of which might be said to run in a common groove. In the Common Law Courts there was not the same view taken as to interrogatories and the discovery of documents as in Chancery; there was more difficulty in getting interrogatories allowed. The Judicature Acts were passed, and under them every Court was bound to do complete justice, and, for good or for evil, a new system of discovery at common law was introduced; they placed a more perfect, but most expensive, machinery in the hands of every person. Notwithstanding all the advantages introduced by the Judicature Acts, they were followed by a great increase of interlocutory proceedings; and it became an object of great importance to prevent the power of discovery being used where it was not really wanted. In order to check unnecessary expenditure, the Rules of the Supreme Court, 1883, have now provided that except in cases of fraud or breach of trust, interrogatories are not to be administered without the leave of the Court. By Order XXXI., rule 25, the costs of discovery are to be secured as is provided by rule 26, "unless otherwise ordered by a Court or a judge." In this case the appellants went to Chambers, and asked Field, J, to dispense with the deposit; they alleged that the respondents consented. Field, J. was of opinion that in this case the consent of the opposite party was not enough; he was not bound to "otherwise order." He came to the conclusion that the consent of the opposite party was not a sufficient reason for dispensing with rule 26, whereas the Queen's Bench Division went further and held that the Court had no discretion to dispense with the deposit. I have very great doubt as to this latter point, but it is not necessary to decide it. The proposition, which we lay down, is that a judge at Chambers is not bound to dispense with the deposit, and to "order otherwise," simply because the parties choose to agree that there shall be no deposit.

Appeal dismissed.

Solicitors for plaintiffs: *Irvine & Hodges.*
Solicitors for defendants: *Crump & Son.*

J. E. H.

[CROWN CASE RESERVED.]

1884
June 28.

THE QUEEN *v.* STEPHENSON AND ANOTHER.

Criminal Law, obstructing Coroner—Coroner—Inquest by Coroner—Inquest, Destruction of Body to prevent—Misdemeanor, obstructing Justice—Burning Dead Body.

It is a misdemeanor to burn or otherwise dispose of a dead body, with intent thereby to prevent the holding upon such body of an intended coroner's inquest, and so to obstruct a coroner in the execution of his duty, in a case where the inquest is one which the coroner has jurisdiction to hold. A coroner has jurisdiction to hold, and is justified in holding, an inquest if he honestly believes information which has been given to him to be true, which, if true, would make it his duty to hold such inquest.

THE following case was stated by Hawkins, J. :—

"These defendants were tried before me at the assizes holden at Leeds on the 15th day of May last, upon an indictment in substance charging them with having burnt the dead body of an illegitimate infant child (named George Stephenson) to which the defendant Elizabeth Stephenson had recently given birth, with the intent to prevent the holding of an inquest upon it. The defendants were both found guilty; but I deferred passing sentence, and admitted them to bail until the opinion of the Court of Criminal Appeal could be obtained upon certain questions of law which I reserved at the request of their counsel. The defendant Elizabeth was, on the 17th of December, 1883, confined of the child in question at the house of a Mrs. Atkinson, at Cayton, near Scarborough, in the North Riding of Yorkshire, with whom it lived until its death on the morning of the 12th of January last.

"On the 9th of January the defendant Elizabeth took it out for the day—it was then quite well—but on the following day it was very poorly and had fits, and it remained ill until its death. The dead body remained in the house of Mrs. Atkinson until the night of the following Monday, when it was surreptitiously taken away by the two defendants and burnt, with intent to prevent the coroner from holding an inquest upon it. The defendant Ann is the mother of Elizabeth, and they lived together at Cayton in a cottage opposite Mrs. Atkinson's.

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"It is fair to the defendants to say that there was no evidence before me to shew that the death of the child was due to any misconduct of theirs, but nevertheless the police, in the discharge of their duty, communicated to the coroner for the North Riding the fact of the death of the child, and such information respecting it, the honesty and bona fides of which he had no reason to doubt, as led him to the conclusion that it was his duty to hold an inquest upon the body. There was no proof that the information given to the coroner was true, but the coroner honestly believed it to be so, and it must be taken as a fact that if the information was true it was the imperative duty of the coroner to hold an inquest. The coroner accordingly appointed the afternoon of the following day—Tuesday the 15th of January—for the holding of such inquest, and of this the defendants had knowledge on the Monday evening. The jury were duly assembled, and the coroner attended pursuant to his appointment, the inquest, however, could not be holden because the body was not forthcoming, it having been, on the night of the Monday, secretly taken from the house of Mrs. Atkinson and burnt by the two defendants as above stated. At the close of the case for the prosecution the learned counsel for the defendants (Mr. *Stuart-Wortley*, for Ann, and Mr. *Mellor*, for Elizabeth) objected to the sufficiency of the indictment that the preliminary averments do not allege that the case was a proper one for an inquest, or that the proposed inquest was one which ought to be held, that the information on which the coroner acted should have been set out, and that it ought to have been shewn that the case was one in which the coroner was bound to hold an inquest. I reserved these objections for the opinion of this Court. "It was then objected that there was no evidence of the truth of the information given to the coroner. I overruled that objection, and held that if the information given to the coroner, and honestly believed by him to be true, was such as, assuming its truth, to make it his duty to hold an inquest, he was fully justified in directing the inquest to be holden; and that the jurisdiction of a coroner to hold an inquest does not depend upon the truth of the information furnished to him, but upon his bonâ fide belief in the existence of circumstances communicated to him, which, if true, would make it his duty to interfere and hold

a court of inquiry on view of the body. I gave Mr. *Stuart-Wortley* leave, however, to raise this question, if he thought fit, on the argument of this case. It must, however, be taken that, assuming the circumstances brought to the attention of the coroner to be facts, he was abundantly justified in the course he took. "The learned counsel for the defendants further objected that, assuming the coroner to have rightly determined to hold the inquest, and the defendants to have secretly obtained, and burnt, and disposed of the body, with the intent to prevent the inquest being held, and so to obstruct the coroner in the execution of his duty, that did not amount to a criminal offence. I held that it did, and having directed the jury in accordance with these rulings, the jury found both defendants guilty.

"I reserved the questions of law above raised for the opinion of this Court. If my rulings are correct, and any one or more counts of the indictment are good, the conviction is to stand. If otherwise, it will be reversed."

Stuart-Wortley, and *H. G. Taylor*, for the defendants. In order to create the offence charged it is essential to prove that the inquest which the coroner proposed to hold was one which it was his duty to hold: *Reg.* v. *Price*. (1) It can be no offence to prevent a coroner holding an inquest which it would be improper or illegal for him to hold. The office of the coroner existed before the Statute de Officio Coronatoris (4 Edw. 1, st. 2, A.D. 1276). In that statute the phrase used is "suddenly dead," but the expression has received a recognised meaning, and does not include cases of death without violence and from ordinary natural causes. The case of *Rex* v. *Justices of Kent* (2), where a man apparently in good health sat down in a chair in a shop, complained of a pain in his hip, and suddenly died, bears out this view. The coroner in that case held an inquest on the body, and was disallowed his fees by the magistrates, on the ground that the inquest was not duly held, and upon an application being made to the King's Bench to interfere by mandamus to compel the allowance of such fees, that Court refused, Lord Ellenborough observing that it was highly illegal for coroners to obtrude them-

(1) 12 Q. B. D. 247, 248. (2) 11 East, 229, 231.

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selves into private families without any pretence of the deceased having died otherwise than by a natural death. In East's Pleas of the Crown it is said "there ought, at least, to be a reasonable suspicion that the party came to his death by violent or unnatural means." (1) In Hale's Historia Placitorum Coronæ it is said, "For though a man dies suddenly of a fever or apoplexy or other visitation of God, the township shall not be amerced, for then the coroner should be sent for in every case; but if it be an unnatural or violent death, then indeed if the coroner be not sent for to view the body, the town shall be amerced." (2) In Jervis on Coroners (3), it is said that there is no occasion (except in the case of a person dying in gaol) for the interference of the coroner, unless there be a reasonable ground of suspicion that the party came to his death by violent and unnatural means. In the present case the child died a natural death, so that the inquest was one which would have been illegal and unnecessary had it been held. It is not said that the coroner had reasonable ground for believing the alleged facts communicated to him, but merely that he did honestly believe them. The defendants knew, it may be urged, that there was no ground for holding the inquest. Reasonable belief, however, of a coroner in statements made to him will not justify such coroner in holding an inquest, for his jurisdiction depends upon the fact of a sudden, that is, a violent death.

[WILLIAMS, J. Is it necessary for you to go so far as that? It is quite possible for the coroner to be justified in holding an inquest, although it should turn out, when it is held, that it was unnecessary. It is enough for you to contend that the parties may be justified in removing the body if the inquest is, in fact, needless.]

Certainly a case of this kind depends upon different considerations from a proceeding against a coroner for improperly and vexatiously holding an inquest. In *Rex* v. *Justices of Kent* (4) the Court exculpated the coroner from intentional improper practice.

(1) 1 East, P. C. 382.
(2) Hale, 2 Hist. P. C. 57.
(3) Jervis on Cor. 4th Ed. p. 31.
(4) 11 East, 229, 231.

See, however, *In re Hull*, 9 Q. B. D. 689, 699, 700, where this matter is considered.

In *Anon.* (1) Holt, C.J., says, "It is matter indictable to bury a man that dies of a violent death before the coroner's inquest," and this tends to shew that to make the offence it has to appear that the death was violent; it is not suggested to be enough if the death is honestly believed by the coroner to be violent.

The following authorities, *Reg.* v. *Clerk* (2); *Rex* v. *Solgard* (3); Hawk. P. C. book 2, c. 9, s. 23; Fitz. Nat. Brev.; Russell on Crimes, 5th ed. vol. i. p. 620; Arch. Cr. P. pp. 1, 3, were also cited.

[STEPHEN, J., referred to the Reports of the Criminal Law Commissioners: Report 8, chap. 5, s. 5; Report 7, p. 62.]

Meek, for the prosecution. The statute is merely directory (4). The common law duties of a coroner are not in any way reduced by the statute. If the law is that inquests are unlawful except where the death was from violence, a coroner should hold a preliminary inquiry, and examine witnesses to see whether he ought to hold an inquest. The jurisdiction of the Court does not depend upon the truth of the information. In *Rex* v. *Justices of Kent* (5), the Court thought the coroner acted unreasonably and vexatiously, whereas here the information, if true, abundantly justified, it is said, the inquest. It is always an offence to obstruct the execution of an Act of Parliament: *Rex* v. *Smith* (6), per Ashurst, J., Arch. Cr. P. p. 3; East's P. C. vol. i. p. 382.

Stuart-Wortley replied.

GROVE J. This conviction should be affirmed. There are two points raised by the case which has been stated; first is it indictable at common law to prevent the holding of a coroner's inquisition? and, secondly, is there enough before us to shew that the coroner had jurisdiction to hold the inquest?

No case that has been referred to is absolutely in point, but there are many cases which shew that interference with statutory duties and the preventing of their performance is a misdemeanor in general at the common law. It is so in cases where statutory provisions are, as here, for the public benefit, and especially

(1) 7 Mod. Rep. 15.
(2) 1 Salk. 377.
(3) 2 Str. 1097.
(4) Hawk. P. C. book 2, ch. 9, s. 21.
(5) 11 East, 229, 231.
(6) 2 Doug. 441.

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where, as here, the matter is one concerning life and death. It is most important to the public that a coroner who on reasonable grounds intends to hold an inquest should not be prevented from so doing. The consequences would otherwise be most formidable, especially in the case, I fear, of young children, for anyone might prevent the holding of an inquest by the destruction of a dead body with impunity, unless it could be proved that the death had been caused by violence. The only evidence might be the examination of the body itself. It might be that the only witness of the death was the murderer of the person found dead. To hold it no offence to prevent the administration of the law by preventing an inquest being held, unless proof could be given of the cause of death, and that it was a violent cause, would set at nought the protection which there is at present to the public. The inquest is itself an inquiry into the cause of death and the present indictment is framed upon this view, the contrary view involves this proposition, that a coroner should be certain of the cause of death before he ventures to hold his inquest—this is certainly not the law. It is certainly not what the statute governing this matter says. A coroner acts and ought to act upon information, not upon conclusive evidence. He inquires in cases of sudden death where such inquiry is desirable. Bracton (1) and the Mirrour (2) shew that the statute is but an affirmation or confirmation of the common law. In the statute there is nothing about murder, the words are "suddenly dead" and the statute requires an examination of the dead body, the whole wording of the statute shews that it is the bodies that are to be examined to find the cause of death. A coroner's inquiry would be useless if the coroner previously had by evidence to satisfy himself of the cause of death. In the present case it appears that there was at the least a reasonable suspicion, and indeed probably more than a reasonable suspicion. The police informed the coroner, the information came from parties whose business it was to look into these matters, probably the coroner honestly believed the information thus given to him. It is clear to my mind that in holding an inquest the coroner would only in such

(1) Lib. iii. (De Corona) ch. v.
(2) The Mirrour of Justices, by Horne, p. 38.

a case be doing his duty, and in this duty the defendants obstruct him by surreptitiously taking away the body and burning it. Their object was to prevent the inquest; the case in Mod. Rep. (1) seems to me in point. In the particular case the death was violent, that either means, appeared to have been a violent one, or it means, was discovered to have been a violent one when the inquest was held, but Lord Holt seems to indicate that the offence was the burying the child before the inquest so as to obstruct the inquest. If it is a crime to bury, à fortiori it is one to burn a body, because if you bury, exhumation is possible, but if you burn, the body is destroyed and examination is no longer possible. However here it is enough to say the coroner had a right to hold the inquest, and the prisoners were wrong in secretly and intentionally burning the body to obstruct him in his duty of holding such inquest.

STEPHEN, J. I am of the same opinion. It is a misdemeanor to destroy a body upon which an inquisition is about to be properly held, with intent to prevent the holding of that inquest. This appears from many authorities and from the case in Mod. Rep. (1). Is it true that it is a misdemeanor to interfere in a case where the coroner is of opinion that an inquest must be held, or is it necessary that the facts should be such that the inquest ought to be held? This matter is not absolutely covered by authority. In one sense we do create new offences, that is to say, that as a Court we can and do define the law from time to time and apply it to the varying circumstances which arise. In *Reg.* v. *Price* (2) I said, "it is a misdemeanor to prevent the holding of an inquest which ought to be held by disposing of the body. It is essential to this offence that the inquest which it is proposed to hold is one which ought to be held. The coroner has not absolute right to hold inquests in every case in which he chooses to do so. It would be intolerable if he had power to intrude without adequate cause upon the privacy of a family in distress, and to interfere with their arrangements for a funeral. Nothing can justify such interference except a reasonable suspicion that there may have been something peculiar

(1) 7 Mod. Rep. Case 15. (2) 12 Q. B. D. 247, 248.

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in the death, that it may have been due to other causes than common illness. In such cases the coroner not only may, but ought to hold an inquest, and to prevent him from doing so by disposing of the body in any way—for an inquest must be held on the view of the body—is a misdemeanor." I say the same thing now, and I concur in my brother Grove's view, indeed any other view would in my opinion be absurd. If a person destroys a dead body or removes it to prevent an inquest being held he is guilty of an offence if the inquest intended to be held was one that might lawfully be held. As has been said in the course of the argument, a man who obstructs an inquest in this way takes his chance of the inquest being one that it was right to hold. It is an obstruction of an officer of justice, it prevents the doing of that which the statute authorizes him to do.

WILLIAMS J. I concur upon the case as reserved. Other collateral questions have been mooted and discussed, but what is reserved is, first, whether a bonâ fide belief in the coroner in information which has been given to him and which information if true could justify an inquest, is sufficient. It is quite clear to me that a bonâ fide belief in information from reliable sources which if true renders it a coroner's duty to hold an inquest suffices to give the coroner jurisdiction. The next question reserved is, whether obstruction of the coroner in this duty of his is, under such circumstances, a misdemeanor; and to that I answer, it most clearly is. With regard to the other questions, which, as I say, do not actually arise for decision, I do not propose to discuss them.

MATHEW J. I am of the same opinion. It is clear I think that the coroner must act upon information of other persons, and must hold his inquest, if he believes honestly, and has reasonable grounds for believing, that that information is such as to call for an inquest. It will never do to allow other persons to decide for themselves whether they will permit an inquest to be held or not.

HAWKINS J. At the trial I had not any serious doubt upon the matter, but the general importance of the question, as well as

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its importance to the persons charged, induced me to reserve the case. If a coroner has information which if true makes it his duty to hold an inquest, and he bonâ fide believes that information, he must I think hold such inquest. Jurisdiction does not depend on actual facts. Jurisdiction to inquire cannot depend upon the actual result of the inquiry. Destroying the body was to make it impossible to hold the inquest, inquests being held upon the body. I am clearly of opinion that the defendants committed the offence charged in making it, as they did, impossible to hold the inquest, and that the conviction must certainly be affirmed.

Conviction affirmed.

Solicitors for prosecution: *Iliffe & Co., for Tasker Hart, Scarborough.*

Solicitors for defendants: *Watts & Kitching, Scarborough.*

C. D.

[IN THE COURT OF APPEAL.]

April 4.

THE QUEEN (ON THE PROSECUTION OF THE SOUTHBOROUGH BURIAL BOARD) *v.* THE OVERSEERS OF THE PARISH OF TONBRIDGE.

Burial Board—Appointment of Burial Board—18 & 19 *Vict. c.* 128, *s.* 12.

The existence of a legally constituted burial board for the whole of a parish, does not prevent the vestry of an ecclesiastical district formed out of such parish under 1 & 2 Wm. 4, c. 38, and which does not separately maintain its own poor, from legally appointing a burial board for such district under 18 & 19 Vict. c. 128, s. 12.

Decision of the Queen's Bench Division (11 Q. B. D. 134) reversed.

APPEAL from the decision of the Queen's Bench Division on a special case, which is set out in the report of the Queen's Bench Division (1).

The following are the material facts:—

Tonbridge is a parish maintaining its own poor, and is constituted of the following six or more ecclesiastical districts of Tonbridge, Tonbridge Wells, St. Peter, Southborough, St. Thomas,

(1) 11 Q. B. D. 134.

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Southborough, St. Stephen, and Hildenborough, none of which districts has ever separately maintained its own poor, and all of them contribute to a common rate levied for the relief of the poor by the parish overseers throughout the entire parish.

The district of St. Peter, Southborough, with a separate burial ground, namely, the churchyard attached to the church, was formed in 1831 under 1 & 2 Wm. 4, c. 38 and other statutes, and in 1871 the district of St. Thomas was formed out of the district of St. Peter, and these two districts have had exclusively for their joint use what had been the separate burial ground of the original district of St. Peter.

In 1855, but subsequently to the passing of 18 & 19 Vict. c. 128, the parish of Tonbridge, exclusive of the ecclesiastical district of Tonbridge Wells, appointed a burial board for such part of the parish as was not included in the Tonbridge Wells ecclesiastical district, and such board was held by the Court of Queen's Bench in *Viner* v. *Tonbridge Overseers* (1) to be legally constituted. That board acquired a site on which it established a cemetery at the end of the town farthest from Southborough, and about three and a quarter miles distant from the church of St. Peter, and the inhabitants of Southborough have been rated for the expenses incidental to the establishment and maintenance of such cemetery, although in fact they have continued to use the St. Peter's burial ground.

A meeting in the nature of a vestry was summoned by the churchwardens of St. Peter's district in February, 1879, at which a burial board was appointed for the two districts of St. Peter and St. Thomas, Southborough, and such board, having afterwards incurred expenses to the amount of 292*l.* 10*s.* in the enlargement of their burial ground, issued in September, 1881, their certificate to the overseers of the parish of Tonbridge for the payment of that sum. The overseers declined to act upon this certificate, and a writ of mandamus having been ordered commanding them to levy and pay that sum to the clerk of the Southborough Burial Board, the case was stated by consent for the opinion of the Court whether upon the above facts there was power under s. 12

(1) 28 L. J. (M.C.) 251.

of 18 & 19 Vict. c. 128 (1), to the inhabitants of Southborough to constitute a separate burial board for the districts of St. Thomas and St. Peter.

The Queen's Bench Division held that the Southborough Burial Board was not lawfully appointed, as it was not intended by the legislature that there should be two separate jurisdictions over the same rateable area.

The prosecutors appealed.

Sir H. Giffard, Q.C., and *Meadows White, Q.C.* (*Archibald*, with them), for the appellants.

A. Charles, Q.C., and *Lumley Smith, Q.C.* (*Candy*, with them), for the respondents.

The arguments were the same as in the Court below.

BRETT, M.R.:—The section upon which we have to give an interpretation is the 12th section of 18 & 19 Vict. c. 128, which says,—"that the vestry or meeting in the nature of a vestry of any parish, township, or other district"—that district is clearly a district which is distinguished from the parish or township "not separately maintaining its own poor, which has heretofore had no separate burial ground"—that is, before the passing of this Act has had no separate burial ground—"may appoint a burial board." It is admitted that those words used in their ordinary grammatical sense apply exactly in terms to this district of Southborough. But it has been urged that nevertheless we are not to so apply them.

It was argued that there were two reasons why we should apply them otherwise than in their ordinary sense to parishes, burial

(1) 18 & 19 Vict. c. 128, s. 12: "The vestry, or meeting in the nature of a vestry, of any parish, township, or other district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a burial board, and from time to time supply vacancies therein, and may exercise the same powers of authorization, approval and sanction in relation to such burial board, and such other powers as under the said Acts and this Act are vested in the vestry of a parish separately maintaining its own poor; and the burial board so appointed shall have all the powers for providing a burial ground, and otherwise, as if such parish, township or other district had been a parish separately maintaining its own poor."

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grounds, and burial boards. In the first place, it was said that if construed according to their ordinary grammatical construction they would practically contradict other sections in a series of Acts of Parliament which apply to burial boards and districts. If it had been found that reading them in their ordinary sense they would contradict some other enactments, but that reading them in a sense in which, though not their ordinary sense, they were reasonably capable of being read, they would not contradict such other enactments, then I agree that they should be read so that all the enactments should be read together without contradicting each other. But I have been unable to discover that by reading this enactment in its ordinary sense it would contradict any other enactments. All that really can be urged is that if read in its ordinary sense it would produce great inconvenience and also great injustice. With regard to inconvenience, I think that that is a most dangerous doctrine. I agree if the inconvenience is not only great, but what I may call an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable, though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning. If an enactment is such that by reading it in its ordinary sense you produce a palpable injustice, whereas by reading it in a sense which it can bear, although not exactly its ordinary sense, it will produce no injustice, then I admit one must always assume that the legislature intended that it should be so read as to produce no injustice. The question then seems to me to be reduced to this, Does the reading of this section in its ordinary sense as applied to the subject-matter produce any absurd inconvenience or any palpable injustice? The alleged inconvenience is that there will be two burial boards. It is suggested that it is inconvenient and, in fact, unjust, that the people who are living in the minor district should have to pay for the maintenance and construction of both burial boards. There is no inconvenience in fact. It cannot be said that it is inconvenient that the one board should manage one burial ground and the keeping it in order, and the other board should manage the other burial ground. The alleged injustice is that ratepayers

may be obliged to bear a double burden. But who are the ratepayers who would be obliged to bear a double burden? Not the people of the larger district. It was suggested by Mr. Charles that there was an injustice on the larger district because it might render the ratepayers of the minor district less able to contribute to the larger district. That is too infinitesimal for any practical application at all. If the effect of allowing the inhabitants of the minor district to appoint a burial board of their own is, ipso facto, to get rid of the burial board of the larger district with regard to them, then there is no injustice. But we must decide this case upon the assumption that after the appointment of a district burial board the inhabitants of the minor district will be still liable to pay rates in respect of the larger burial board for its maintenance, and perhaps for further purchases of burial ground for the larger district. It is said that is an injustice, because the inhabitants of the minor district will have to pay double rates. But it is not an obligation imposed upon them, except by their own free will and choice. They prefer, for purposes of their own, to have the indulgence of paying the double rates, and there is no injustice in allowing them to do so; but there might be an injustice if you prevented them. Because there has been a burial board at one time appointed for the whole of a large parish when circumstances were different, that therefore a district at one end of the parish which has become rich and populous, and which for its own purpose and convenience desires to have a separate burial board and burial ground of its own, shall not be allowed to have it, would, as it seems to me, upon a balance of injustice, be more unjust than to allow them to do what they want, and to subject themselves only at their own will and pleasure to pay an increased amount. We ought therefore, in my opinion, to stand by the golden rule and read this section according to its ordinary grammatical sense as applied to the subject-matter. And if so, this district was entitled to form a burial board, and a board so formed was a legal burial board. I cannot see that any of the cases which have been cited are at all in conflict with the decision we now come to, notwithstanding some expressions in the judgment of Blackburn, J., in *Reg.* v. *Overseers of Walcot St. Swithin* (1),

(1) 2 B. & S. 571; 31 L. J. (M.C.) 221.

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which seem to be in favour of the view that a double burial board might be absurd, and some expressions of Crompton, J., in that case seem to shew a doubt in his mind whether they might not be unjust. But I cannot see the absurdity or injustice, and after due consideration I do not think there is anything in that judgment which ought to overrule the opinion which I have formed.

BAGGALLAY, L.J. As the other members of this Court have a clear opinion that this appeal should be allowed, my dissent, even if I expressed any, would be immaterial, but I feel bound to say that during the argument I have entertained considerable doubts, which have not been altogether removed, though they are not so strong as to induce me to dissent from the judgment of the other members of the Court. The 15 & 16 Vict. c. 85, had for its main object the discontinuance of burials within the Metropolis, and making provision for other burial grounds. That Act of Parliament was confined to parishes in their integrity. I look to the definition of the word "parish," and I find that a parish is a "place having separate overseers of the poor and separately maintaining its own poor." I find also that the word "overseers" is explained as "any persons authorized and required to make and collect" "the rate for the relief of the poor of the parish." Then came the Act 16 & 17 Vict. c. 134, which in effect extended the provisions of 15 & 16 Vict. c. 85, to parishes not in the Metropolis, but that, again, was limited to "parish." Then came 18 & 19 Vict. c. 128, which deals with parishes as a *whole*. And this 12th section of that last Act provides that a burial board may be appointed for a district forming a portion of a whole parish, where such district does not separately maintain its own poor, and has theretofore had a separate burial ground. There can be no question at the present time that the Southborough district had its own separate burial ground, and it is not separately maintaining its own poor. As appears from the facts in the case of *Viner* v. *Tonbridge Overseers* (1) the Southborough district has had its separate burial ground, viz., a yard adjoining the church, for years before any of these Acts were passed, and it must be a matter of considerable inconvenience to the inhabitants of this

(1) 28 L. J. (M.C.) 251.

district to have only a burial ground three or four miles from their own church, away from where they live. Now I think it must be admitted if this 12th section stood by itself it would be sufficient to embrace the case which has arisen, and would entitle the burial board appointed for Southborough district to call upon the overseers of Tonbridge for the amount of expenses of enlarging the Southborough burial ground; and although in construing an enactment I fully assent to what the Master of the Rolls has said about giving words their simple ordinary meaning, I think that where there is an enactment to be read with others, its meaning may be affected by such other enactments, and I should rather treat them together. I felt the force of the argument that when a burial board has been appointed for the whole of a district there is no provision for the appointment of a burial board or ground for a portion of such entire district, and that raised a doubt in my mind all the way through, although such doubt was to some extent removed when I considered the 5th section of 20 & 21 Vict. c. 81, which seems to indicate the general view of the legislature to be that there is a power of dealing with portions of a district for which a burial board has been appointed, even if a board has been appointed for the whole. As I have already said, my doubts have not been wholly removed, though they are not sufficient to make me dissent from the judgment of the Court.

LINDLEY, L.J. It is impossible to read these Acts of Parliament without saying there are obscurities and difficulties. This is the state of things,—there is an ecclesiastical district carved out of the old mother parish of Tonbridge under 1 & 2 Wm. 4, c. 38, that is St. Peter, Southborough. Another district, namely, that of St. Thomas, was carved out of St. Peter in 1871, but I do not think this is material on the question we have to solve, and it is sufficient for the purposes with which we have to deal that the district, St. Peter, is a district not separately maintaining its own poor which has a separate burial ground. Now the rest of the facts which are material are these: Tonbridge Wells is also a district formerly carved out of the same old mother parish of Tonbridge, and Tonbridge Wells has a burial ground of its own. Now let us look at the state of things in 1855 when 18 & 19

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Vict. c. 128, was passed. At that time, as I understand, Tonbridge, meaning thereby the whole parish, minus Tonbridge Wells, had not got a burial board. Now the Acts of Parliament passed before 1855 relating to these matters applied to parishes; and 18 & 19 Vict. c. 128, expressly states that it was found necessary to amend these Acts and to make further provisions for the burial of the dead. Then by s. 12 of that Act provision is made for the appointment of burial boards for districts which were not parishes, and if we look only at the language of that section it is impossible to deny that the present case comes within its terms. That being so, what is the difficulty of applying it to this case? Supposing the old mother parish of Tonbridge had had a burial board existing or appointed under the Acts before 1855, I apprehend that the mere fact that it had a burial board would not preclude a district carved out of it from having a burial board of its own. The fact that you have two jurisdictions appears to me to make no difference. The 4th section of 23 & 24 Vict. c. 64, to which Mr. Charles referred us, prohibits the appointment of a burial board without the approval of one of Her Majesty's principal Secretaries of State for an entire parish where such parish has been divided into districts, and any of such districts has a separate burial ground; but I infer from that it was possible to have a burial board in a district and also to have one for the whole parish—so that I cannot see that prior to 1860 the mere fact of its creating a double jurisdiction would prevent such board from being appointed. It has been argued that the Act 20 & 21 Vict. c. 81, and *Reg.* v. *Overseers of Walcot St. Swithin* (1) are opposed to the construction we put on s. 12 of 18 & 19 Vict. c. 128. It is very true an attempt was made to prevent certain inconveniences which might flow from the construction we put upon s. 12. But what does seem strange is that if a district of a parish can appoint its own burial board under s. 5 of 20 & 21 Vict. c. 81, it should not have the same privilege under s. 12 of 18 & 19 Vict. c. 128. Possibly under s. 5 of 20 & 21 Vict. c. 81, some of the inconveniences are obviated, but I see no reason why on that account s. 12 of 18 & 19 Vict. c. 128, should be restricted. What are the inconveniences which may arise? If the inhabitants

(1) 2 B. & S. 571; 31 L. J. (M.C.) 221.

of Southborough district expect that by getting their own burial board they will rid themselves of liabilities, they may find themselves mistaken. They will have the inconvenience as regards their burial board of being subject to a double rate, but no one will impose that on them but themselves, and I do not see any particular injustice in that, and it is no sufficient reason for saying that this case is not within s. 12 of 18 & 19 Vict. c. 128.

It appears to me that the true construction of that section is that which has been given by the Master of the Rolls, and that, therefore, this appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Tilleard, Godden, & Holme.*
Solicitors for respondents: *White & Sons.*

W. P.

DAUBUZ AND OTHERS *v.* LAVINGTON.

April 4.

Practice—Action by Mortgagees against Mortgagor for possession of Land—Tenancy created by Deed of Mortgage—Special Indorsement of Writ—Order III., rule 6 *(F)—Order XIV.*

The relationship of landlord and tenant may be created by a mortgage deed, and therefore, in an action for recovery of land by mortgagees from a mortgagor in possession under a mortgage deed creating a tenancy between them, the writ may be specially indorsed under Order III., rule 6 (F), so that Order XIV. will apply, and final judgment may be ordered.

APPEAL from chambers.

Writ indorsed, "The plaintiffs' claim is for possession of the freehold land and hereditaments known as the Twineham Grange estate, containing together 161*a.* 2*r.* 39*p.*, or thereabouts, with the capital messuage, stables, cottages, barns, outhouses, and appurtenances situate in the parish of Twineham in the county of Sussex, which land and premises are on the tithe commutation map for the said parish numbered as follows," &c. "The above described land and hereditaments were demised by the plaintiffs to the defendant by indenture of the 19th of December, 1881, at the rent there mentioned, subject to a proviso that the plaintiffs might, at any time after the 25th of December, 1881, enter into

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and upon the said lands and hereditaments, or any part thereof, and thereby, or in any other way they might think fit determine the tenancy thereby created without giving to the defendant any previous notice to quit. The said tenancy of the defendant was duly determined by notice to quit and entry on the said lands and hereditaments on the 8th of February, 1884."

The plaintiffs were mortgagees and the defendant mortgagor of the premises under a deed of mortgage containing the following attornment clause: "Lastly, the said mortgagees being in possession according to the true intent and meaning of the Bills of Sale Act, 1878, do hereby demise unto the said mortgagor the lands, hereditaments, and premises hereinbefore expressed to be hereby granted, and the said mortgagor doth hereby attorn tenant thereof to the said mortgagees at the rent of 360*l.* per annum, being a fair and reasonable rent within the meaning of the said Act, to be paid in advance half-yearly on the 24th of June and on the 25th of December in every year, the first of such payments to be made on or before the execution of these presents, and the next on the said 24th of June, and so on thenceforth; provided, nevertheless, that the said mortgagees and the survivors and survivor of them, and the heirs of such survivor, their or his assigns, may at any time after the said 25th of December, 1881, enter into and upon the said lands and hereditaments, or any part thereof, and thereby, or in any other way they or he may think fit, determine the tenancy hereby created without giving to the mortgagor any previous notice to quit, and further, that nothing hereinbefore contained shall constitute the said mortgagees mortgagees in possession for any other purpose than the making of the above determinable demise, or subject them to any liability to account, or other liability incident to the position of mortgagees in possession." Payments being in arrear, notice to quit "forthwith" was given.

On an application under Order XIV. the master gave leave to defend. The plaintiffs appealed to Field, J., at chambers, who held that there was a tenancy which had been duly determined within the meaning of Order III., rule 6 (F.), and made an order for judgment. (1)

(1) W. N. 5 Ap. 1884, p. 95.

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Scarlett, for the defendant. First, the relationship of landlord and tenant must exist in order to satisfy the terms of Order III., rule 6 (F), and does not exist in this case. Secondly, the plaintiffs are not entitled to summary judgment under the order.

The relationship between the parties was that only of mortgagor and mortgagee, and the attornment clause was inserted in the deed to improve the security by giving a speedy remedy by distress. A power of distress may be contracted for without creating the relationship of landlord and tenant. If the mortgagor were actually tenant he would be liable to pay double value for holding over, and the mortgagees be liable for his improvements. The incidents of the relationship of landlord and tenant, and of mortgagor and mortgagee, are so different, that it would be anomalous that they should co-exist under the same deed. The term must be duly determined by notice to quit, and the notice to quit mentioned in rule 6 (F) must be such as is given by landlord to tenant. The mortgagor may have made underleases, as under the Conveyancing Act, 44 & 45 Vict. c. 41, s. 18, he might do. In *Hobson* v. *Monk* (1) there was a similar attornment clause, but it was held at chambers that the proviso enabled the plaintiff to enter not as landlord but as mortgagee, and that Order XIV. did not apply. The rule only applies when the term has absolutely expired.

Reginald Hughes, for the plaintiffs, was not called on to argue.

LORD COLERIDGE, C.J. The order of Field, J., should be affirmed. The question is whether Order XIV. applies to the case, and if this is an action "for the recovery of land . . . by a landlord against a tenant whose term has expired or has been duly determined by notice to quit" within Order III., rule 6 (F).

This case is between mortgagor and mortgagees, and the mortgagor had been allowed to remain in possession, the mortgagees remaining out of possession, and, as far as the relationship of mortgagor and mortgagee is concerned, having security on the land only.

But by this deed the relationship of landlord and tenant is created between them, and if so, it matters not that their relation-

(1) W. N. 26th Jan. 1884, p. 17.

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ship of mortgagor and mortgagee remains. There may be two sets of obligations between the same parties. Mortgagor and mortgagee may be landlord and tenant. Then the relationship of landlord and tenant being created, has the term been determined? If giving notice to quit was necessary, it has been given and the term properly determined. It has been suggested that it was not necessary to give the notice to quit, because, truly enough, it is said the relation of mortgagor and mortgagee *as* mortgagor and mortgagee requires no notice, and the mortgagee is entitled at any time to end the possession of the mortgagor; and therefore, either the tenancy has been properly determined by notice to quit or by exercise of the mortgagees' will. Then why should not the Rule apply? It certainly ought to apply. It is just that it should, and the only contention against it must be that the mortgagor should be allowed to remain in possession—not because he has any defence, for he has none—but that he may put the mortgagees to the expense and trouble of the trial of an action to recover the land, and delay the time in which they ought to get possession. For the reasons I have given it appears to me that the relationship between the parties is accurately described, and the writ properly indorsed under rule 6 (F) of Order III., and Order XIV. applies.

CAVE, J. I am of the same opinion. The parties have agreed that to the relationship of mortgagor and mortgagee shall be superadded the relationship of landlord and tenant. I see no reason why that should not be done. It has been done for a long series of years for the purpose of giving the mortgagee a better remedy than he would otherwise have, and it has been recognised by numerous decisions tending to shew that the fact of giving him power to distrain puts the mortgagee in the position of landlord. The power to distrain is an incident which the law attaches to the relationship of landlord and tenant. I am clearly of opinion there was the relationship of landlord and tenant. Then has the tenancy expired or been determined by the notice to quit? I agree with my Lord that either it has been determined by notice to quit, or it was a tenancy to exist during the will of the landlord, and no longer, and the landlord has intimated his will that

the term shall exist no longer. Therefore, whichever way the case is put, it is clearly within Order III., rule 6 (F), and the decision of Field, J., was right.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Hughes, Masterman, & Rew.*
Solicitor for defendant: *Cherry.*

J. R.

[IN THE COURT OF APPEAL.]

May 13.

PALMER *v.* JOHNSON.

Vendor and Purchaser—Misdescription in Particulars of Sale—Contract for Compensation—Error discovered after Execution of Conveyance.

The plaintiff purchased at a sale by auction certain property belonging to the defendant described in the particulars of sale as producing a net annual rental of 39*l.*, and one of the conditions of sale was, "if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale but compensation shall be allowed by the vendor or purchaser as the case may require." After the conveyance (without any covenants) had been executed by the defendant to the plaintiff, it was discovered by the plaintiff that the rental of 39*l.* was a gross rental, the net rental being considerably less:—

Held, that, notwithstanding the error was not discovered until after the conveyance, the plaintiff was entitled to compensation under the conditions of sale.

Cann v. *Cann* (3 Sim. 447) and *Bos* v. *Helsham* (Law Rep. 2 Ex. 72) followed.

Manson v. *Thacker* (7 Ch. D. 620), *Besley* v *Besley* (9 Ch. D. 103), and *Allen* v. *Richardson* (13 Ch. D. 524) dissented from.

APPEAL by the defendant from the judgment of Smith, J., on further consideration. (1)

The following are the material facts:—

The defendant on the 22nd of March, 1882, put up for sale by auction certain property described in the particulars of sale as freehold property with an annual net rental of 39*l.* The plaintiff was the highest bidder for and purchaser of such property at 650*l.* On the 16th of August, 1882, a conveyance of the property was executed by the defendant to the plaintiff. It was a conveyance in fee without any covenants whatever. In January, 1883, the plaintiff discovered, as the fact was, that the rental described as

(1) 12 Q. B. D. 32.

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being a net rental of 39*l.* per annum was a gross rental, the net rental being considerably below that sum. Amongst the conditions of sale under which which the property was sold the 12th was as follows: "The property is believed and shall be taken to be correctly described, but if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, but compensation shall be allowed by the vendor or purchaser as the case may require; the amount of such compensation to be settled, regard being had to the purchase-money, by the auctioneer, whose decision shall be final." The auctioneer refused to adjudicate. The Plaintiff brought this action for damages for the misstatement as to the value, basing his claim, first, upon the contract for compensation as in the 12th condition of sale, and, secondly, upon a fraudulent misrepresentation by the defendant. The trial took place before Smith, J., at the Nottingham Summer Assizes of 1883, when the jury negatived the fraud on which the second ground of claim was founded, but found the facts as above stated to be true with respect to the cause of action on the contract, that the plaintiff had purchased upon the faith of the statement in the particulars of sale, and that he had been damnified thereby to the extent of 50*l.* It was objected on behalf of the defendant at the trial that as the plaintiff had taken a conveyance of the property the action was not maintainable. The learned judge on further consideration gave judgment for the plaintiff for 50*l.*

The defendant appealed.

Lawrence, Q.C., and *W. Graham*, for the defendant. There was no fraud, the question as to that was found in favour of the defendant; then the plaintiff, having accepted the conveyance, cannot sue for compensation in respect of any error in the particulars of sale. The auctioneer never fixed the sum; he refused to do so.

[BOWEN, L.J.:—Do you say that the auctioneer should have settled the amount before this action was brought, and that if the auctioneer improperly refused to do so he was liable to an action?

Buszard, Q.C., for the plaintiff:—No such point was taken at the trial.]

That is so, and no such point is now insisted on. The contract for compensation was at an end when the deed of conveyance was executed; it was only preliminary to such deed, and it became afterwards merged in it. The plaintiff will rely on *Cann* v. *Cann* (1) and *Bos* v. *Helsham* (2); but in *Cann* v. *Cann* (1) there was no such contract for compensation, and the decision must therefore have been founded on the misrepresentation having been fraudulent. It is certainly impossible to distinguish *Bos* v. *Helsham* (2) from the present case, but the decision in that case is considered by Malins, V.C., in *Manson* v. *Thacker* (3) as being based, like that of *Cann* v. *Cann* (1), on a fraudulent misrepresentation, and not only in that case, but in the two subsequent ones of *Besley* v. *Besley* (4) and *Allen* v. *Richardson* (5), the Vice-Chancellor acted altogether on a different principle, and held that in a case like the present one the purchaser was barred by his laches in not discovering the error sooner from suing for compensation after he had accepted the conveyance. It is true that this principle of the purchaser being guilty of laches was not followed by the late Master of the Rolls in *In re Turner & Skelton* (6). However *Hart* v. *Swaine* (7) and the judgment of Williams, J., in *Joliffe* v. *Baker* (8) are in favour of the defendant, and James and Brett, L.JJ., in *Leggott* v. *Barrett* (9) shew that where there has been a preliminary contract which has ended in a deed the rights of the parties must be afterwards regulated by the deed only. Moreover, on the true construction of the 12th condition the compensation was not intended to be paid for after the conveyance had been executed, for the error therein referred to was only the error in the description of the property, and the compensation, if any, for that was to be settled by the auctioneer before completion by the acceptance of a conveyance.

Buszard, Q.C., and *Stanger*, for the plaintiff, were not called on.

BRETT, M.R. In this case one point only has been deliberately and, I think, rightly argued as an objection to the judgment for

(1) 3 Sim. 447.
(2) Law Rep. 2 Ex. 72.
(3) 7 Ch. D. 620.
(4) 9 Ch. D. 103.
(5) 13 Ch. D. 524.
(6) 13 Ch. D. 130.
(7) 7 Ch. D. 42.
(8) 11 Q. B. D. 255.
(9) 15 Ch. D. 309, 311.

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the plaintiff, and that point is that the right of the plaintiff to recover damages in this action could not be maintained after the conveyance to him had been completed. The question whether the auctioneer was the person to fix the damages, if any, to which the plaintiff was entitled, has not been raised on behalf of the defendant, and we give no opinion about it, and therefore the only question is whether when the particulars of sale contain a misstatement of a fact, and there is an express contract in the form of the condition of sale in this case, the purchaser can recover compensation for such misstatement after he has taken a conveyance of the property. This is not a case in which a purchaser seeks to set aside a conveyance on the ground of fraud, or in which he seeks to recover damages in respect of a fraudulent representation; nor is it a case in which there has been an erroneous statement and no express contract as to the way in which it is to be dealt with, for there is here an express contract in the condition for giving compensation in the case of such misstatement.

Now, the first point is that which was taken on behalf of the defendant as to the true construction of the 12th condition. It has been contended that "any error, misstatement, or omission," mean any error, misstatement, or omission only in the correct description of the property, and nothing else. That is contrary, I think, to their true meaning, which does not admit of anything so limited. This is a contract that if any error in the particulars be discovered it shall not annul the sale, but a compensation for it shall be allowed, and it is therefore a contract which in legal effect is the same as that in *Cann* v. *Cann* (1) and also as that in *Bos* v. *Helsham* (2), and the points which have been taken here for the defendant were equally open to argument in both those cases, and it would be impossible to decide this case in favour of the defendant without overruling the ground of the decision in *Cann* v. *Cann* (1), and absolutely the decision itself in *Bos* v. *Helsham*. (2) The contract is one which is daily contained in conditions of sale by auction, and when there is with respect to it the decision of such a case as *Bos* v. *Helsham* (2), which having been on demurrer could easily have been brought by appeal to

(1) 3 Sim. 447. (2) Law Rep. 2 Ex. 72.

the Exchequer Chamber, and ultimately to the House of Lords, and yet one finds it unchallenged until now, after a lapse of eighteen years, and when also one finds that it was preceded in 1830 by the case of *Cann* v. *Cann* (1), in which a deliberate statement of the law was made, on which the case of *Bos* v. *Helsham* (2) was founded, one cannot but say that this Court, according to what has been a universal practice, even of a Court of Error, would decide now in the same way, even though it would not have come originally to the same decision. All the sales by auction which have occurred since those decisions must have taken place on the law which had been so published, and therefore it would be very wrong now for this Court to overrule those decisions. It is true that there are two cases in which Malins, V.C., took a different view of the law. A Court of Law is not justified, according to the comity of our Courts, in overruling the decision of another Court of co-ordinate jurisdiction, and therefore the Vice-Chancellor ought not to have differed from those former decisions. That is the rule which Jessel, M.R., adopted in *In re Turner & Skelton* (3) where he considered that Malins, V.C., ought not to have overruled the previous cases, and where he not only followed, but agreed absolutely with, the decisions in *Cann* v. *Cann* (1) and *Bos* v. *Helsham*. (2) The reasoning of Kelly, C.B., and Channell, B., in *Bos* v. *Helsham* (2) are, I think, very strong to shew that where there is a contract in writing under which, as in the present case, compensation is to be made for any error in the particulars of the property, and where there is no limitation of time within which the error must be discovered, the Court would have to insert in this contract a limitation which the parties have not inserted, and which therefore it ought not to do, if the Court were to hold that the purchaser should not be entitled to compensation after the execution of the conveyance. Therefore I am far from saying that I differ from the decision in *Bos* v. *Helsham* (2), but it is immaterial whether I agree with it or not, for the ground of my judgment to-day is that the two cases of *Cann* v. *Cann* (1) and *Bos* v. *Helsham* (2) are decisions on the law as to matters which come in the daily transactions of life, and which cases having

(1) 3 Sim. 447. (2) Law Rep. 2 Ex. 72.

(3) 13 Ch. D. 130.

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been for so many years unchallenged, ought not now to be overruled, whether they be right or wrong.

With regard to the cases of *Besley* v. *Besley* (1) and *Allen* v *Richardson* (2), decided by Malins, V.C., I cannot agree with them. They are absolutely at variance with *Cann* v. *Cann* (3) and *Bos* v. *Helsham* (4) and are not law. As to the elaborate judgment of Williams, J., in *Joliffe* v. *Baker* (5), if it conflicts with those two cases on which our decision is founded, I think to the extent it so conflicts it cannot be upheld. The case of *Hart* v. *Swaine* (6) has really nothing to do with the point now before us. That was a case of setting aside the sale and conveyance on the ground of fraud in selling land as freehold which in truth was copyhold, and my Brother Fry had to consider the evidence and come to his conclusion thereon, so that the whole question there was only one of fact. Then it has been said that what was stated as to the law in *Leggott* v. *Barrett* (7) is at variance with what we are now deciding; I think that there was nothing wrong in the statement of the law in that case, but it is not applicable to the present one. Smith, J., in his judgment, from which this appeal is brought, points out all that was there meant, "All that was there held was," he says, "that where the parties enter into a preliminary contract which is afterwards to be carried out by a deed to be executed, there the complete contract is to be found in the deed, and that the Court has no right whatever to look at the preliminary contract." But *Bos* v. *Helsham* (4) has decided that this particular contract for compensation was one which was not to be carried out by the deed of conveyance, and therefore it did not come within that principle of the law and was not merged in the deed. For the reasons I have stated, in my opinion the judgment appealed against ought to be upheld.

BOWEN, L.J. I am of the same opinion. We have to decide what was the agreement between these parties, and that, to some extent, turns on the construction of the 12th condition of sale,

(1) 9 Ch. D. 103.
(2) 13 Ch. D. 524.
(3) 3 Sim. 447.
(4) Law Rep. 2 Ex. 72.
(5) 11 Q. B. D. 255.
(6) 7 Ch. D. 42.
(7) 15 Ch. D. 306, at pp. 309, 311.

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which is in the common form. Nothing is more clear than this, that the parties may make what bargain they please as to the sale, and may agree whether the compensation for any error shall be for error discovered up to the time of the conveyance, or after it has been executed. Therefore, the first question is, what is the interpretation of the agreement in this case. Now it is commonly said, that where there is a preliminary contract for sale which has afterwards ended in the execution of a formal deed, you must look to the deed only for the terms of the contract, but it seems to me one cannot lay down any rule which is to apply to all such cases, but must endeavour to see what was the contract according to the true intention of the parties. Suppose the parties should make a parol contract, with the intention that it should afterwards be reduced into writing; and that that which is reduced into writing shall be the only contract, then, of course, one cannot go beyond it; but if they intend, as they might, that there should be something outside such contract, they might agree that that should exist, notwithstanding it was not in the contract which was put into writing. In the same way, when one is dealing with a deed by which the property has been conveyed, one must see if it covers the whole ground of the preliminary contract. One must construe the preliminary contract by itself, and see whether it was intended to go on to any, and what, extent after the formal deed had been executed. Therefore, in the present case, one has to consider what is the true construction of this 12th condition. If it were not for the previous decisions, one might have thought that such condition was intended only to cover the interval before the formal deed of conveyance, but when, in dealing with such a condition as this, which is so frequent on the occasion of the sale of property, you find that the Courts have put a particular construction upon it which has been unchallenged for many years, it would be unjust to alter it, and I do not think that it is now open to this Court to do so after the case of *Bos* v. *Helsham* (1), which followed *Cann* v. *Cann* (2), decided in 1830. I must say that I do not think that Vice-Chancellor Malins was justified, under the circum-

(1) Law Rep. 2 Ex. 72.

(2) 3 Sim. 447.

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stances, in differing from those two previous cases. The same law as was laid down in those cases was adopted by the late Master of the Rolls in *In re Turner & Skelton* (1), and therefore I think the decisions of Vice-Chancellor Malins in *Manson* v. *Thacker* (2), *Besley* v. *Besley* (3), and *Allen* v *Richardson* (4), cannot prevail against the weight of the authority of the previous decisions.

FRY, L.J. I am of the same opinion. It seems to me that the question depends on the construction of the 12th condition. Does it provide for compensation in the event of any error in the particulars being discovered at any time, or only on its being discovered at some time before the conveyance of the property? Much might be said on both sides on the argument of this question, but the condition is one which is extremely common and of frequent occurrence, and no doubt it has been used for several years, for a similar one is to be found in *Cann* v. *Cann* (5), which was decided fifty-four years ago, and it must then have been a usual one or it would not have been used in a sale, as it was in that case, under the Order of the Court of Chancery. Now *Cann* v. *Cann* (5) decided that such a stipulation for compensation, as in this condition, referred not only to an error discovered before the conveyance but to an error discovered after the conveyance. The principle decided in that case was adopted by the Court of Exchequer in *Bos* v. *Helsham* (6), and no doubt ought now to be entertained as to its authority, notwithstanding the different view which Vice-Chancellor Malins would appear to have taken in *Manson* v. *Thacker* (2), *Besley* v. *Besley* (3), and *Allen* v. *Richardson*. (4) I am bound to state that I agree with what has been said by the other members of this Court as to its not being desirable to interfere with decisions pronounced so long ago; since it is impossible to deny that during the fifty-four years which have elapsed numerous contracts must have been made, and monies paid, on the footing of the law as established by

(1) 13 Ch. D. 130.
(2) 7 Ch. D. 620.
(3) 9 Ch. D. 103.
(4) 13 Ch. D. 524.
(5) 3 Sim. 447.
(6) Law Rep. 2 Ex. 72.

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Cann v. *Cann* (1), and which law I, for one, am not inclined to alter.

Then has this contract been varied by the conveyance? Plainly it has not. The mere fact of a conveyance does not vary or extinguish it. In *Joliffe* v. *Baker* (2) there was no such stipulation as there is in this case for giving compensation, and although there are observations by Williams, J., in his judgment, the decision itself is no authority upon this point. In *Leggott* v. *Barrett* (3), Lord Justice James and the present Master of the Rolls laid down what is indubitably the law, that when a preliminary contract is afterwards reduced into a deed, and there is any difference between them, the mere written contract is entirely governed by the deed, but that has no application here, for this contract for compensation was never reduced into a deed by the deed of conveyance. There was no merger, for the deed, in this case, was intended to cover only a portion of the ground covered by the contract of purchase.

Judgment affirmed.

Solicitors for plaintiff: *Swann & Co., for E. N. Elborne, Nottingham.*

Solicitors for defendant: *Lee, Ockerby, & Everington, for Bright, Nottingham.*

(1) 3 Sim. 447. (2) 11 Q. B. D. 255.
(3) 15 Ch. D. at pp. 309, 311.

W. P.

1884
May 19.

[IN THE COURT OF APPEAL.]

THE WEST LONDON COMMERCIAL BANK, LIMITED *v.* KITSON AND OTHERS.

Company—No Power to accept Bills—Acceptance by Directors "for and on behalf of Company"—Personal Liability.

A bill of exchange payable to order and addressed to the B. & I. Company, which was incorporated under local Acts and had no power to accept bills, was accepted by the defendants, who were two of the directors of the company, and also by the secretary, as follows:—"Accepted for and on behalf of the B. & I. Company, G. K., F. S. P. directors; B. W. secretary." The bill was so accepted and given by the defendants to the drawer, the engineer of the company, on account of the company's debt to him for professional services, and although he was told by the defendants that they gave him the bill on the understanding that he should not negotiate it, but merely as a recognition of the company's debt to him, as the company had no power to accept bills, yet the defendants knew that he would get it discounted, and they meant that he should have the power of doing so. The bill was indorsed by the drawer to the plaintiffs for value, and without notice of the understanding between him and the defendants:—

Held, affirming the decision of the Queen's Bench Division, that the defendants were personally liable, as by their acceptance they represented that they had authority to accept on behalf of the company, which being a false representation of a matter of fact and not of law, gave a cause of action to the plaintiffs, who had acted upon it.

APPEAL of Kitson and Porter, two of the defendants, from the judgment of the Queen's Bench Division (Day and Smith, JJ.) on a special case.

The facts are fully set out in the report of the case before the Queen's Bench Division (1), and are also stated in the following judgment of Brett, M.R.

Terrell, for the defendants Kitson and Porter. The company had no power by their Acts of Parliament to accept, and therefore the representation by the acceptance of the bill on behalf of the company by these two defendants as directors was a representation of a matter of law only and not of any fact, and consequently formed no cause of action when it was not true: *Bateman*

(1) 12 Q. B. D. 157.

v. *Mid-Wales Ry. Co.* (1), *Beattie* v. *Lord Ebury* (2), *Eaglesfield* v. *Marquis of Londonderry* (3), and *Rashdall* v. *Ford.* (4)

F. Turner, for the plaintiffs, was not called upon.

BRETT, M.R. This is one of the simplest kinds of a common law action. The defendants allow a bill to be drawn which they accept under these circumstances. They were the directors of a company—a tramway company—which was formed under two private Acts of Parliament, the terms of which no one knew or was bound to know but they themselves, and they knew that by those Acts of Parliament they had no authority to accept bills for the company. Ashdown, the engineer of the company, was pressing for payment of his claim against the company, and knowing that he could not get cash, he asked to draw a bill on the company, which he asked the defendants to accept, in order that he might apply to his father-in-law to advance him money on it; but he did not undertake not to apply to any one else for that purpose. The special case states that the defendants accepted the bill accordingly, but they did not communicate with the father-in-law, nor did they do anything beyond telling Ashdown that they gave him the bill on the understanding that he should not negotiate it, and only as a recognition of the company's debt to him, as the company had no power to accept bills. What is the meaning of that statement in the case? We are to be at liberty to draw inferences of fact. They who drew this special case do not venture to state in it that the defendants accepted the bill on the terms that Ashdown should not negotiate it. Of course it was not taken by Ashdown on those terms, but it was taken for the purpose of his negotiating it, and so the defendants knew. That is the inference of fact I draw from this case. The defendants accepted the bill knowing that Ashdown would negotiate it, that is to say, get it discounted. The acceptance was in this form: "Accepted for and on behalf of the B. and I. Company, G. K., F. S. P., directors; B. W., Secretary." The meaning of that is plain. It is that we accept as directors for and on behalf of the company, so that any one who should take the bill would

(1) Law Rep. 1 C. P. 499.
(2) Law Rep. 7 Ch. 777, per Mellish, L.J. at p. 800; 7 H. L. 102.
(3) 4 Ch. D. 693.
(4) Law Rep. 2 Eq. 750.

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assume that the company had power to accept it, and that the defendants, as directors, were authorized by the company to accept it. That is what this acceptance meant, and it was so given in order that the bill might be discounted. By whom was the bill to be discounted? Surely not by the person who knew that the company had no power to accept, and that the defendants had no authority to do so for the company. The acceptance was meant to represent that the company had such power, and that the defendants had such authority. Whether there was in fact such power or not depended upon the private Acts of Parliament of the company, and therefore I think that this acceptance amounted to a statement that the private Acts of Parliament gave the company power to accept this bill, and that the defendants were authorized to accept it for the company. That was a statement of fact to the persons who should discount the bill, and made so that they should suppose that there was such power and authority to accept the bill. It was made that it should be acted on, and it was acted on by the persons who it was intended should act on it. It was a false representation made by the defendants with the knowledge that it was false, and therefore the persons to whom it was made have a cause of action for such false representation.

BOWEN, L.J. I am of the same opinion. This bill was accepted for and on behalf of the company by the two directors and secretary; and at the time they so accepted it, the defendants must have known that it was intended to be used for the purpose of raising money. They meant it to be so used, and that it should pass to a third person. What is the effect of their signatures as acceptors to this bill? It is a representation that they had authority to sign as directors on behalf of the company, and as they intended that the bill should pass to third persons they are bound to make it good. It has been said the representation was a representation of a matter of law, and that therefore the defendants are not bound to make it good. Where there is a representation made as to a mere matter of law it is, in nineteen cases out of twenty, made by a person who does not know the law better than the person to whom it is made, and at whose risk it is taken and acted upon. Still I am not prepared to say—and I

doubt whether, if a man who wilfully misrepresented the law—would be allowed in equity to retain any benefit he got by such misrepresentation. When that case arises it will be time to determine that point, but it is not necessary to do so now. In the present case it is not a representation of a matter of law. It is a representation as to the powers of a company to accept bills, and that depends on their private Acts of Parliament. Suppose I were to say I have a private Act of Parliament which gives me power to do so and so. Is not that an assertion that I have such an Act of Parliament? It appears to me to be as much a representation of a matter of fact as if I had said I have a particular bound copy of "Johnson's Dictionary." It does not fall within those cases in which a man makes an assertion of a matter of law to one who has equal means with himself of knowing what the law is. I think in the present case there was a misrepresentation of a fact and not of a matter of law, and that therefore the case does not fall within the class referred to by Mellish, L.J., in *Beattie* v. *Lord Ebury* (1). With regard to *Rashdall* v. *Ford* (2), the plaintiff in that case purchased a Lloyd's bond, not on any representation at all as to its validity, but for what it was worth. It is, therefore, very distinguishable from the present case.

FRY, L.J. I am of the same opinion. It appears to me that the defendants, by accepting this bill for and on behalf of the company, made a representation that the company had power to accept it. I think that that was a representation of a matter of fact and not of law, because, whether there was such power or not depended on the provisions of private Acts of Parliament. That representation was acted upon as it was intended by the defendants it should be acted upon. It was a false representation, and I have come to the conclusion that by reason of its having been made, and made falsely, the plaintiffs have sustained damage. All these together form a cause of action, and I therefore agree that the plaintiffs have a right to maintain this action.

Appeal dismissed.

Solicitors for plaintiffs: *Shaw & Co.*

Solicitor for defendants: *G. F. Jones.*

(1) Law Rep. 7 Ch. 777. (2) Law Rep. 2 Eq. 750.

W. P.

1884
May 28.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF THE EAST AND WEST INDIA DOCK COMPANY *v.* THE ASSESSMENT COMMITTEE OF THE POPLAR UNION.

Poor-rate—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67) *ss.* 36, 46, 47—*Supplemental Valuation List—Alteration during preceding twelve Months—Diminution of Income—Evidence—How rateable Value in Supplemental List to be ascertained.*

On an appeal from the assessment committee as to a supplemental valuation list under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), evidence of a falling off in receipts of tonnage rates on vessels coming to certain docks during the twelve months preceding the making of the supplemental list when the rates were the same, and which, as compared with former years, shews a continuous and not accidental falling off, is sufficient if not explained or rebutted to shew an alteration in the rateable value of the docks during that period within the meaning of s. 46.

When such alteration has been established, and it has therefore to be entered in a supplemental list, the rateable value of the docks is to be ascertained, not by opening up the previous quinquennial or supplemental list, but by assuming the value in the list then in force to be the correct value at the commencement of the twelve months preceding, and by deducting from it the diminution in value from the alteration during that period.

Decision of the Queen's Bench Division (11 Q. B. D. 721) reversed (Fry, J., dissenting).

Appeal by the prosecutors from a decision of the Queen's Bench Division on a special case stated by the court of general assessment sessions under the Valuation (Metropolis) Act, 1869. The facts are fully stated in the report of the proceedings before the Queen's Bench Division (1). They were shortly the following:—

At the quinquennial valuation made in 1880, the gross and rateable values of the docks, premises, and hereditaments of the prosecutors, the East and West India Dock Company, lying in the parish of All Saints, Poplar, were fixed at 127,776*l.* and 91,896*l.* respectively, and such values were duly entered in the quinquennial valuation list for 1880. On the 27th of May, 1882, a notice was given by the company to the overseers of the parish

(1) 11 Q. B. D. 721.

requiring them to make and deposit a supplemental valuation list within the meaning of s. 46 of the Valuation (Metropolis) Act, 1869 (1), shewing the alterations which had taken place within the preceding twelve months in the gross and rateable value of the hereditaments of the company.

On the 1st of June, 1882, the overseers made and deposited a supplemental valuation list but did not include in it any of the hereditaments of the company or the gross or rateable value thereof. On the 24th of June, 1882, the company gave notice that they were aggrieved at the omission, and desired that the

(1) The following are sections 36 & 46 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), viz.:—

Sect. 36. "If any of the parties to the appeal apply to the justices in assessment sessions to direct a valuation of any hereditament with respect to which any appeal may be made, and if such applicant or applicants give such security as the court thinks proper to pay the cost of the valuation, the court may, in their discretion, appoint some proper person to make such valuation."

Sect. 46. "Every valuation list shall be revised in manner directed by this Act, and such revision in every period of five years (the first of such periods beginning with the 6th of April, 1871), shall be conducted as follows:—

(1.) In each of the first four years of such period a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall shew all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations. If no alteration has taken place which makes a supplemental list necessary, the overseers shall send a certificate to that effect to the assessment committee in place of such list, which certificate may be in the form contained in the second schedule to this Act.

(2.) In the fifth year of every such period the overseers shall make a new valuation list.

(3.) The same regulations shall be observed and the same proceedings shall be had in the case of a supplemental list and a new valuation list as are directed by this Act and the Acts incorporated herewith in the case of the valuation list made in the first year after the passing of this Act.

(4.) A supplemental list and a new valuation list shall come into force at the beginning of the year succeeding that in which they are respectively made in the same manner and subject to the same conditions as the valuation list made in the first year after the passing of this Act.

(5.) In each of the last four years of such period the valuation list which was in force on the day before the commencement of each such year, together with, and as altered by, the supplemental list, if any, which comes into force at the commencement of such year, shall be the valuation list which is in force during that year.

(6.) A new valuation list when it comes into force shall supersede the valuation list which was in force during the fifth year of such period."

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list should be corrected by the insertion therein of their hereditaments at an assessment of 70,067*l.* gross and 50,391*l.* rateable value, or thereabouts.

On the 29th of September, 1882, the assessment committee heard counsel for the company in support of their objection. With a view of proving that there had been an alteration within the meaning of s. 46 of the Valuation (Metropolis) Act, 1869, entitling the company to a revision of the valuation list, they tendered in evidence the books and balance-sheets of the company from 1874 to 1881 inclusive, and offered to verify, by the testimony of witnesses, the facts and figures therein contained, and contended that the said books and balance-sheets shewed a continuous and considerable decline in the receipts of tonnage rates, although the rates had been the same, and, therefore, shewed a decline in the profits of the company during the preceding twelve months. The assessment committee declined to insert the property of the company in the supplemental valuation list, on the ground that no such alteration had been made in the value of such property as contemplated by the Valuation (Metropolis) Act, 1869.

Thereupon the company appealed to the court of assessment sessions, and that court decided, subject to the opinion of the Queen's Bench Division on the special case, that the whole of the evidence mentioned in the case which was tendered to the assessment committee was relevant and admissible, and that such evidence, if proved, was sufficient to establish an alteration within the meaning of s. 46 of the said Act, and that the company were entitled to have the hereditaments valued at their present actual value, and such value entered in the supplemental list, and not merely any alteration in value which might have taken place during the preceding twelve months, and that court ordered that the supplemental valuation list be altered by inserting therein the hereditaments of the dock company, and directed a valuation to be made upon the principle of their decision.

The point of law reserved for the opinion of the Queen's Bench Division was whether the decision and order of the court of assessment sessions, or any and what part of it, was good.

The Queen's Bench Division ordered the order of the court of assessment sessions to be quashed.

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The prosecutors appealed.

Sir Hardinge Giffard, Q.C., and *Kenelm Digby* (*Marriott, Q.C.*, with them), for the appellants. The evidence tendered was admissible, and it shewed a diminution in the rateable value of the docks and therefore an alteration within the preceding twelve months within the meaning of s. 46 of the Valuation (Metropolis) Act, 1869: *Reg* v. *New River Co.* (1), *Reg* v. *Abney Park Cemetery Co.* (2), and *Reg.* v. *Bristol Dock Co.* (3). An alteration having occurred within the meaning of that 46th section, the company were entitled to a supplemental valuation list, in which the rateable value to be inserted should be its present true actual rateable value, whether that was greater or less than the rateable value in the quinquennial valuation list.

Sir F. Herschell, S.G., and *Holl, Q.C.* (*Fullarton*, with them), for the respondents. The Act intended that the quinquennial valuation should be conclusive for five years, unless some structural or other extraordinary alteration in the property should occur in the meantime: such alteration, to be within the meaning of the 46th section, must not be a fluctuating one, and not a mere diminution of profits in any one year, which might have been allowed for or taken into calculation when the quinquennial valuation was fixed. Next, assuming an alteration in the rateable value of the property during the preceding twelve months to have been shewn, it is not competent to open up the whole question of the rateable value of the property, but only to inquire into the nature of such alteration and how much it has added to or taken from the value as fixed in the quinquennial or other existing valuation list. Sect. 47 shews that a new valuation is not to be made, but only a list "containing the gross and rateable value as so increased or reduced."

Kenelm Digby replied.

BRETT, M.R. In this case the Divisional Court has quashed an order of sessions. There was evidence tendered before the sessions court which was admissible and relevant, but the Divi-

(1) 4 Q. B. D. 309. (2) Law Rep. 8 Q. B. 515.
(3) 1 Q. B. 535.

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Brett, M.R.

sional Court came to the conclusion that such evidence did not give primâ facie evidence of such an alteration in value as would entitle the ordering of a supplemental list. The appeal is from the decision of the Divisional Court; but it is, I think, impossible to deal with the matter without considering not only that decision, but the order of the sessions, to see whether, if we disagree with the Divisional Court, the order of sessions should stand as it is, or whether it should be altered, and, if so, in what respect.

Now the matter to be considered is the rateable value of certain docks. They were valued at the quinquennial valuation in 1880, when a rateable value was fixed as the proper rateable value for such docks. During the quinquennial period the dock company assert that there ought to be a supplemental list by reason of an alteration in the rateable value of the docks which had occurred within the year preceding. It is asserted against them that there is no evidence of any such alteration as ought to entitle the company to have a supplemental list made altering the rateable and gross annual value of the docks.

It is clear to me that unless the company can shew that, by reason of something which has happened within the year preceding their application, the rateable value of their docks is altered, the valuation in the quinquennial list must stand whether it was right or wrong at the time when it was fixed. The Divisional Court has held that evidence was tendered, which was admissible and relevant, to shew that there was such an alteration, but that Court seems to have considered that when admitted it did not offer primâ facie evidence of an alteration within the preceding twelve months.

The evidence tendered was first of all the books and accounts of the receipts and expenditure of the dock company during the last preceding year, and the accounts for several preceding years, with evidence to justify their accuracy, and it was said that such evidence would shew that during the preceding year there was a considerable falling off in the receipts of tonnage rates, although the rates themselves had not been altered. It seems to me that the necessary inference from that would be that such diminution in the receipts could only have occurred by there being a less

amount of tonnage of ships coming into the dock. If that stood alone, would it not be primâ facie evidence of an alteration of the rateable value during the year? It is not, however, necessary to decide that point, for here the dock company propose to shew that that diminution in the amount of tonnage in the last preceding year was not a mere accidental but was a successive and permanent diminution. If they prove that there was a less amount of tonnage coming into these docks during the last preceding year, and that that was not accidental, but was a regular decreasing of the business coming to their docks, I cannot but think that that would be primâ facie evidence of a diminution in the business of the company during the last preceding year which was not accidental. It may be explained or rebutted by evidence to shew that it really does not affect the rateable value of the docks. No one would say that a mere temporary falling off in the receipts would affect the rateable value. If a temporary fall in the receipts during one year would be rectified by an increase of receipts next year, no tenant would care much about such temporary decrease; but if there were evidence which seemed to shew a regular falling off in the receipts it would not be reasonable to suppose that a yearly tenant would give the same rent for the property, taking one year with another. Therefore, I think that the Divisional Court was right that the evidence tendered was admissible and relevant, but I differ from that Court when it is said that, though admissible, it did not afford primâ facie evidence of an alteration within the year. I think it did. If so the sessions court ought to be allowed to consider that evidence, and by that and any other admissible evidence which may be offered ascertain whether there has been anything which has caused an alteration within the year of the rateable value of the docks. Then I think it would be wrong to send the case back to the sessions unless one were to endeavour to assist them as to what they would have to decide upon the evidence brought before them, and by means of such evidence. That, however, raises a question of extreme difficulty, and which probably will really only be finally decided by an appeal to the House of Lords.

It has been argued that if an alteration during the year has been proved, which is, as it is said, a condition precedent to

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having a supplemental list, then the moment that condition precedent has been fulfilled, the whole inquiry as to what is the rateable value of the hereditaments is to be begun de novo, as if they had never been valued at all before, and there had never been any quinquennial valuation, and then you are to compare that value when so ascertained with the value in the existing list, and if the figure be different from the figure in the existing list you are to enter that new figure, and the alteration will be an increase or reduction of the rateable value, as the case may be. If that be true the Solicitor General pointed out very considerable difficulties, which, as it seemed to me, would arise, since it would then be in the power of anyone to force an appeal against the existing list (whether that would be the quinquennial list, or a previous supplemental list) after the time had elapsed for appealing, because by making some alteration in his hereditament, or by reason of some alteration in it occurring, he could then re-open the whole matter. So that although his hereditament had been increased in value by what had so occurred in the year, yet by reason of the former valuation having been erroneous the rateable value in the supplemental list might be less than it was in the former list. I cannot think that the Act of Parliament ought to be construed so as to produce that result. The meaning of the Act is, I think, that the existing valuation unappealed against, should be taken to be correct, and that what you have to do is, treating the existing list as correct, to see whether what has occurred since has altered that which was the rateable value before. If that be true it seems to me that the gross rateable value in the supplemental list is also to be ascertained by assuming that the value in the list then in force is correct at the commencement of the year, and by adding to or taking from such value the addition or diminution, as the case may be, arising from the alteration during the year. When the alteration has been thus ascertained the value as altered is to be entered in the supplemental list.

We therefore vary the order of the Divisional Court by sending the case back to the sessions in order that they may hear evidence, and if upon that evidence they can affirm the proposition that there has been an alteration, they must then make a

supplemental list, and enter the altered value in such list accordingly.

BOWEN, L.J. This seems to me to be a very difficult case. The rateable value of the docks was ascertained when the quinquennial list was made out, but what we have to decide is whether what has happened since within the twelve months last preceding, has entitled the dock company to have a supplemental list, and to have the figure of valuation in the original list corrected. The argument which has been addressed to us on the point may be divided into two branches; first, whether any evidence was laid before the sessions which, unqualified or unrebutted, was primâ facie evidence of an alteration in the rateable value of the premises, and if there was such evidence then we have to consider to what extent effect should be given in the amendment of the list.

Now as regards the first of these matters, it seems to me that the falling off in the receipts of tonnage rates during the twelve months when the rates were uniform, that is to say, the fact of there being less tonnage coming into the docks, with the light shed upon it by a previous continuous fall in former years, amounts to some evidence that during the last year the rateable value of the docks was not what it was before. I wish, however, it to be distinctly understood that we do not decide that there has been any alteration of the rateable value, but only that there is primâ facie evidence of such alteration, and that it is for the sessions to see whether upon a consideration of all the facts as may be brought before them there is anything to modify such primâ facie evidence. The second matter to be considered is what is the exact correction which the Act requires to be made if some alteration is shewn to exist. Is the whole matter open and the quinquennial list to be set aside, or is only such correction to be made in the figure in the existing list as represents the alteration which is shewn to have taken place in the rateable value during the twelve months? The Solicitor-General has truly pointed out that the quinquennial list is a substantial part and basis of the Act. The object is that on the one hand you shall not drift year by year on the old valuation, and yet on the

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other hand you shall not have an inquiry every year into the value of the premises. The value is to be fixed every five years, but a machinery is provided for readjusting it when necessary, but only upon certain conditions, and within certain limits. The quinquennial list was to be a reality, and it was to last for five years. The preamble of the Act is not unimportant as shewing its object, it states that, "it is expedient to provide for a common basis of value for the purposes of government and local taxation, and to promote uniformity in the assessment of rateable property in the metropolis." The first section dealing with the quinquennial list which I need allude to is s. 43, and that provides that the valuation list as approved by the assessment committee is to last for five years subject to any alteration that may be made by any supplemental or provisional list as thereinafter mentioned and by s. 45 it is conclusive for the purpose of certain rates, including most of the rates in force during the year. Then comes s. 46, upon a true construction of which our decision must turn. It contains provisions for readjustment by means of a supplemental list. It says, "in each of the first four years of such period a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall shew all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations." Now what is it you want to get upon the supplemental list? The Act does not say you are to get upon it the real actual rateable value, but that the list shall shew the alterations, and limited by this that they must be alterations which have taken place during the preceding twelve months. It is true, as Sir Hardinge Giffard has pointed out, that what is in the supplemental list is not a notice that there has been an alteration, but a figure which represents the alteration. This figure, however, does not shew an alteration unless it bears some relation to such alteration. To my mind the words of the section mean this (though I do not say so confidently, for I think they are very obscure), that the supplemental list must shew the figure to which the rateable value should be altered, so as to shew the alteration that has occurred during the preceding twelve months. Therefore it must be assumed that the

existing list was correct at the commencement of the twelve months, and what has to be done is only to make such alteration as will shew the alteration in the rateable value during this limited period. If this be not the true construction of the statute any ratepayer could always practically appeal after the time for appealing had expired by making some alteration of the premises, and so challenge discussion before a different tribunal of the value at which the original tribunal arrived.

A difficulty was pressed upon us with reference to s. 36. It was said that in arranging the supplemental list, the Act requires you to follow all the regulations and proceedings which are directed to be taken in the case of the original valuation list, and as s. 36 enables the justices in assessment sessions to direct a valuation of the hereditaments on the application of any of the parties to the appeal, so it follows that in making up the supplemental list there is the same power of directing a valuation to be made out. I do not feel pressed by that argument, because I think it is not clear in the first place that s. 36 is intended to be incorporated therewith by s. 46, sub-s. 3, for the purpose of a supplemental list, nor, next, do I think it clear that the sessions might not have power under s. 46 to direct the principle and way under which the valuation should be made. Taking a broad view of the Act, I think that it would not be consistent with the Act to have the value ascertained by the quinquennial list wholly set aside whenever any alteration in the value of the hereditament was shewn to have taken place within the preceding twelve months, but that such list ought to be treated as correct at the time it was made, and be corrected only to the extent it has been affected by such alteration.

FRY, L.J. There are two questions in this case. The first is whether the fall or diminution in the receipts of tonnage rates by the dock company, whilst the rates remain the same, is some evidence of diminution in the rateable value of the docks. It appears to me that it is a matter which would be taken into consideration by a person who was about to become a tenant. It is true that it might be only a casual or accidental diminution and capable of being rebutted, but standing unanswered it is, I

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think, admissible evidence, and evidence on which the sessions might find that the rateable value had been diminished.

The second question is this, assuming that the alteration is shewn to have taken place during the year, in what way are the sessions to proceed. Is the rateable value to be ascertained de novo, or is the alteration only to be ascertained? Here I have the misfortune to differ from my learned Brethren, and I need hardly say I do so with great diffidence.

It appears to me that the general scope of this Act is to ascertain the true rateable value of property in the metropolis, and that that object is worked out in this way: There is to be a quinquennial valuation list made which shall be in force for five years unless an alteration in the rateable value shall occur in some one of those years, but if it does, then the list is to be amended: and there are two modes for doing this, namely, by a provisional list and by a supplemental list. Now the 46th section is the one with which we have to deal in the present case. That section contains machinery for ascertaining the rateable value but none for ascertaining the alteration itself. Therefore it seems to me the alteration is to be ascertained by comparison of the new list with the old list. The 1st sub-section of the section says that there is to be a supplemental list if necessary, and, therefore, it is only to be made if necessary: but if necessary, it is to "be made out in the same form as the valuation list," that is, as the quinquennial valuation list, for no other form is given, "and shall shew all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations." It appears to me that such alteration may be shewn in one or other of two ways. You may either state the difference in value by actual amount, as for instance, if it be the difference between 100*l.* and 500*l.*, by putting down 400*l.*, or you may shew that at one time the value of the property was 100*l.*, and at another time it was 500*l.* Either of those ways will shew the alteration, but in one only will the list be in the same form as the original valuation list. In the one the difference will be shewn by the comparison of the new list with the old, and the new list will be, as required by the Act, in the same form as the original

list; whereas in the one in which the difference itself is shewn the new list cannot possibly be in the form of the original list. I think, therefore, that the proper way is to draw up the new list in the same form as the old one. The 3rd sub-section of the 46th section is, I think, important; it is this: "The same regulations shall be observed and the same proceedings shall be had in the case of a supplemental list and a new valuation list as are directed by this Act and the Acts incorporated herewith in the case of the valuation list made in the first year after the passing of this Act." The effect of that appears to me to be to introduce all the provisions with regard to appeals in the case of a valuation, one of which, namely, s. 36 empowers the Court to direct a valuation of the hereditament, with respect to which there may be an appeal. That appears to me to be the only direction which the Act gives as to the mode of ascertaining the valuation in the supplemental list, and I repeat that there is no provision in the Act for ascertaining the alteration itself. Then sub-s. 6 of s. 46 provides that "a new valuation list when it comes into force shall supersede the valuation list which was in force during the fifth year of such period." I have only to add this, when one refers to the interpretation clause (s. 4), it appears to me that the valuation must include both or one of the two values, viz., "the gross value" or "rateable value" mentioned in that interpretation clause, and that must be ascertained by reference to the rent which the hypothetical tenant would be expected to give.

Several arguments of great weight have been urged against the construction I put upon the Act. It is said that s. 47 which deals with the provisional list shews that what is to be entered on the list is "the gross and rateable value as so increased or reduced." But I read those words as meaning the true gross and rateable value, as in fact it is when so increased or reduced. The words are not "gross and rateable value ascertained by the previous list," and they refer in my opinion to the actual value of the property increased or diminished by the alteration. Then it is said that it would be very improbable that the Act should contemplate the ascertainment of the true value when an alteration has taken place during the year, but should not have any provisions for correcting the original valuation list in case it

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should be wrong. The answer to that I think is this: the Act assumes the original valuation list to be right, but of course if it turns out to be wrong there is then no reason why it should not be corrected. Then it is said that it will be competent to a person who considers that he has been overrated by the quinquennial list to make an addition to his property, and by means of that alteration obtain a reduction in the rateable value. I am not sure of that, because I am inclined to think he would fail in proving an alteration in value as required by the Act; but supposing it to be so, it would be at least a highly improbable case, and extreme cases are not safe guides in the constructions of a statute. Lastly it has been said that as any alteration might give rise to a revision, an alteration in the name of the occupier might require a revaluation of the property. I doubt if that is the true construction of the enactment, and I rather think that a new valuation is a a different thing from an alteration in other respects, because I find the words "supplemental list" and "new valuation list" spoken of separately. However, when the point arises it will be time enough to consider whether the mere change in the name of the occupier would give a right to have a revision.

I think, therefore, that the Act provides a machinery in the case of a supplemental list for ascertaining the real value just in the same way as a quinquennial value is to be ascertained, and that the alteration may be shewn by a comparison between the new and the original list.

Appeal allowed (1).

Solicitors for appellants: *Freshfields & Williams.*
Solicitor for respondents: *J. W. Marsh.*

(1) The case was remitted to the sessions to proceed with the further hearing of the question, according to the order made by the Court of Appeal.

W. P.

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May 30.

Gaming—Bicycle Grounds—Manager of—Betting there—Liability of Manager (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The appellant was manager of bicycle grounds. Bicycle races, at which 20,000 spectators were present, took place there. Placards with the words "No betting allowed," were posted in the grounds, and twelve police constables were employed there by the manager, but some betting took place about twenty yards from the winning-post where he stood, acting as judge of the races. He was aware that betting would and did take place, but could not have wholly prevented it under the circumstances, although he might have repressed it to a certain extent with the aid of the constables:—

Held, that as the business of the grounds was not that of illegal betting within 16 & 17 Vict. c. 119, s. 1, he was not liable to conviction under s. 3, as a "person having the care or management of or in any manner assisting in conducting the business of any . . . . place opened, kept, or used for the purposes aforesaid."

Case stated by the recorder of Leicester upon the hearing of an appeal against a conviction by justices for the borough of Leicester.

The conviction of the appellant alleged that he unlawfully had the care and management of a certain place, to wit, the Belgrave Road Cricket and Bicycle Grounds, situate, &c., then and there opened and used for the purpose of other persons betting therein upon certain events and contingencies of and relating to a certain bicycle race: 16 & 17 Vict. c. 119, ss. 1, 3.

The appellant was the manager employed by the directors of a company to which the grounds belonged. Their extent was about ten acres, they contained a fenced oval track for trotting matches, enclosing a circular bicycle track (also fenced) within which last was the cricket ground, thus leaving two crescent-shaped plots from which the spectators witness the sports. A charge was made for admission. On the day named in the conviction a championship bicycle race took place at which there were about 20,000 persons present, more than on any previous occasion. The winning post was at the junction of the two tracks on the left hand side from the entrance, and in the acute angle nearest to it there was a great crowd collected. At this spot stood also a

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number of persons known to the police as betting men. Some were accompanied by clerks, who took down bets as made, and odds were called out in a loud voice. The appellant was acting as judge or umpire at the winning post, counting the times each bicyclist passed, and scoring them upon a board. This was about twenty yards from the spot where the bets were called out. A witness who assisted him was called to prove that no betting was heard, but he admitted that he had remarked to the appellant upon its being a tame affair, as he had expected to hear betting as on previous occasions, but it appeared that the result of this race was supposed to be a foregone conclusion for one of the competitors. Other witnesses were called to prove that no betting took place. The recorder was however satisfied that there was betting, and that the appellant was aware that it would and did take place, although he may not have heard any particular wager made.

Upon this day the appellant had asked for and obtained the services of twelve police constables, who were paid by the company.

These men received no instructions to interfere with betting either from him or from the police authorities, but six other constables in plain clothes were sent from the station to report upon what took place, and were called as witnesses for the prosecution. They did not however complain to the appellant nor to the directors, with some of whom one or two of them conversed, nor did they make any attempt to stop what was going on, except that the inspector spoke to one man, who thereupon desisted.

Placards with the words "No betting allowed" were posted in the grounds by the appellant, but beyond this he did not interfere. After the race was over a large number of printed betting cards bearing the names of men engaged in betting were picked up by the police. These had been torn up and thrown on the turf. It was proved that money was received as deposit for the bets made, in return for which these tickets were given. There were no chairs or stools used, and the persons making the bets had been admitted like others at the ordinary entrance.

An inspector of police proved that some three or four years before he had called the attention of the appellant to betting upon a trotting match, and that they went together to the

offenders desiring them to desist, which they accordingly did. The crowd, however, on the day of the offence charged in the conviction was, as above stated, very large, and particularly at the part of the ground where this betting took place, and the recorder was satisfied that the appellant could not have wholly prevented betting under the circumstances, although he might have repressed it to a certain extent with the aid of the constables.

The counsel for the appellant submitted that there was no case upon these facts, and that the appellant had not knowingly and wilfully "permitted" the grounds to be opened, kept, or used for the purpose of betting. The counsel for the respondents contended that those words in the 3rd section did not apply to the person "having the care or management," but only to the case of an owner or occupier, and the recorder was of that opinion. The cases relied upon were *Haigh* v. *Town Council of Sheffield* (1), and *Eastwood* v. *Miller* (2), within which the recorder thought the present conviction came. But for the judgments in those cases, he said, he should have doubted whether under the circumstances the appellant could be held to have opened, kept, or used a house, office, or other place for the purpose of persons using the same for betting with persons resorting thereto, having regard to the purpose of the Act and the language of s. 1, and should have also doubted whether he could be said to so keep it on the facts here for a purpose not primarily contemplated, and which it was not practicable in such a concourse of persons effectually to suppress. But as both these points had been fully considered and dealt with in the decided cases, and the second especially by Lush, L.J. and Archibald, J., in *Eastwood* v. *Miller* (3), and also by Lord Blackburn in *Haigh* v. *Town Council of Sheffield* (4), the recorder affirmed the conviction.

The question for the opinion of the Court was "whether upon the above facts the appellant was properly convicted of opening and keeping the grounds for the purpose of betting."

Sills, for the appellant. The conviction was wrong. It is bad

(1) Law Rep. 10 Q. B. 102.
(2) Law Rep. 9 Q. B. 440.
(3) Law Rep. 9 Q. B., at pp. 444, 446.
(4) Law Rep. 10 Q. B., at p. 107.

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on the face of it. The grounds were opened for lawful games. There was a great concourse, and the appellant was judging the races. He was managing a lawful business. No connivance by him with the betting men was ever suggested. It is not found that he heard any bets made. To render him liable under s. 3 it was necessary to shew that he had the care or management of the business of a place opened, kept, or used for the purpose of the owner, occupier, &c., betting with persons resorting thereto. Mere betting is not illegal. In *Eastwood* v. *Miller* (1) the occupier was convicted, the justices found that he knowingly used or permitted the pigeon shooting ground to be used for the purpose of betting. And *Haigh* v. *Town Council of Sheffield* (2) was also a proceeding against the occupier, and the magistrate found that the occupier of the ground used for foot races knew of the betting and took no steps to prevent it, and might have prevented it. Those cases turn on a different part of s. 3, and do not apply.

A. K. Loyd, for the respondent. The conviction is good, and is in the form given in Oke's Formulist (6th ed.), p. 104, tit. Betting Houses, Form 3. No objection to the form was taken before the recorder, who might, if necessary, have amended it.

The material words of 16 & 17 Vict. c. 119, s. 3, must be read "any person having the care or management of a place used for the purposes aforesaid," viz., those specified in s. 1. He is answerable, in the absence of the proprietor, if the place is so used. Sect. 3 relieves the prosecution from the onus of proving knowledge in the manager, and it is for him to shew that he used all diligence to prevent betting. Here there was evidence that he knew of it, and did not take any step to prevent it. The place was used for the purpose of betting within the meaning of the Act: *Eastwood* v. *Miller* (1), *Haigh* v. *Town Council of Sheffield* (2). As Lush, J., pointed out in the latter case, ordinary betting was not forbidden by the legislature in 8 & 9 Vict. c. 109, but "the present statute was intended to deal with a more degenerate form of gambling and one of a more demoralising character. The words of the enacting part go beyond the words of the preamble, not for the purpose of extending the operation of the Act, but for the better carrying out the

(1) Law Rep. 9 Q. B. 440. (2) Law Rep. 10 Q. B. 102.

object intended, and reaching every kind of evasion which might otherwise have been attempted."

No doubt, lex non cogit ad impossibilia, and many cases might be put of a manager being unable to prevent some betting, when, therefore, he would not be held liable; but it is for him to shew the impossibility, and primâ facie he is liable if there is betting. Although the business of the grounds be legal, yet if the manager is shewn to know of illegal betting then he would surely be liable.

The words "place" and "purposes" aforesaid must be construed according to *Eastwood* v. *Miller* (1) and *Haigh* v. *Town Council of Sheffield* (2), which left no option in the justices to do otherwise than convict the appellant. But if knowledge in him must be shewn, then—

Secondly, there was ample evidence that he knew of the betting, and might, at least partially, have suppressed it. He did not attempt to put a stop to it, and therefore, must be taken to have connived at it: *Redgate* v. *Haynes* (3), which was not modified but recognised as an authority in *Somerset* v. *Hart* (4).

Sills, replied.

HAWKINS, J. In my opinion the conviction ought to be quashed. In the first place the conviction on the face of it discloses no such offence as is described by s. 3. It does not allege that the place was used for either of the purposes mentioned in s. 1, but simply alleges that the place was used for the purpose of other persons betting therein, and this would apply to persons betting with one another in the ordinary way, which is not interfered with or dealt with by the legislature. But it is unnecessary to deal with defects on the face of the conviction, because I am clearly of opinion that there was no evidence before the justices recording it, to warrant them in finding the appellant guilty on any of the sections in question. I suppose it is common knowledge that before the passing of 16 & 17 Vict. c. 119 in 1853, there existed in London and other populous places, offices and houses where a regular business of betting was

(1) Law Rep. 9 Q. B. 440.
(2) Law Rep. 10 Q. B. 102.
(3) 1 Q. B. D. 89.
(4) 12 Q. B. D. 360.

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carried on. The offices or houses were sometimes conducted by a manager or the owner or occupier whose business it might be said to be, or sometimes the offices or houses were entrusted to a servant, while the managers were elsewhere employed attending races in the country. The business was of this kind: a list of races about to take place and the current odds against each horse were placarded, and the proprietor, who either himself or by another conducted the business, received deposits from all sorts of persons to abide the event of races on which they were willing and anxious to bet, and they in return for their deposits usually had a ticket handed to them which enabled them when the race was over to receive the money from the office if they won, and if they lost, the deposit was gone, and they had no further interest in the bet.

Such was the business, and it was confined chiefly to offices or houses. It was found that those offices or houses had a tendency to bring many persons to ruin, and especially to lead clerks and servants to spend money in gambling. It was for the suppression of that class of betting that the Act was passed. The preamble of it states exactly what the legislature desired to suppress. The Act is entitled "An Act for the suppression of betting-houses," and recites that "a kind of gaming has of late sprung up tending to the injury and demoralisation of improvident persons by the opening of places called betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies." For the suppression thereof it is enacted by s. 1, which is directed against the office or place itself, "that no house, office, room or other place shall be opened, kept or used for the purpose of the owner, occupier or keeper thereof or any person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto . . . . and every house, office, room or other place if so kept or used for the purposes aforesaid or any of them, is hereby declared to be a common nuisance and contrary to law." Then comes s. 2, enacting that every house, room, office or place opened, kept or used for the purposes afore-

said, or any of them, shall be taken and deemed to be a common gaming house within the meaning of the Act 8 & 9 Vict. c. 109. The object of s. 1 virtually was to cause every house, office, room or other place (which for the sake of brevity, I will in this judgment henceforth speak of as "place" only) opened, kept, or used for the purpose of betting with persons resorting thereto, *or* for the purpose of any money being deposited for bets, to be deemed a nuisance contrary to law. So much for the premises. That section did not affect or impose any penalty on the individuals who might keep the place or use it, unless indeed they brought themselves within the common law, which rendered every one who kept such a place liable to indictment for nuisance. But s. 3 enacts that "any person who being the owner or occupier of any . . . place, or a person using the same, shall open, keep or use the same for the purposes hereinbefore mentioned or either of them; and any person who being the owner or occupier of any . . . place . . . shall knowingly and wilfully permit the same to be opened, kept or used by any other person for the purposes aforesaid or either of them"—then follow the important words—"and any person having the care or management of or in any manner assisting in conducting the *business* of any place . . . opened, kept or used for the purposes aforesaid" shall be liable to a penalty not exceeding 100*l*. It seems to me that this enactment first provides against and imposes a penalty on all persons who being owners or occupiers of or persons using such places as are mentioned in the statute, use them for the purposes mentioned in s. 1, and then on any person who being the owner or occupier knowingly and wilfully *permits* the same to be so opened or used for such unlawful purpose. In either of those cases a penalty attaches. The statute provides against the *user* of the place for illegal betting, and provides against unlawfully *permitting* the place to be used for unlawful betting by the owner or occupier. So far, the manager is not dealt with. But the section proceeds "and any person having the care or management of or in any manner assisting in conducting the business of any . . . place . . . opened, kept or used for the purposes aforesaid or either of them" shall be liable to the like penalty. The

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question is, whether the defendant is within the meaning of that part of the section? What is there to fix any liability or guilt on him? He was no doubt in every sense a person "having the care or management" and a person "assisting in conducting the business of the place" in question, viz., the business of the bicycle grounds. But the business of the bicycle grounds was perfectly lawful. The employer of the appellant did not countenance using them for any purpose contrary to the statute. Betting was no part of the appellant's duty.

It would be idle affectation to suppose for a moment that the owner of the ground would be ignorant of the fact that very many persons who assembled to witness the sports there would bet amongst themselves. It is almost a matter of course on such occasions, but the law does not forbid ordinary betting between man and man who meet together, whether accidentally or by appointment. The law will not assist the maker of a bet to recover the sum won, and leaves each of those who bet to rely for payment on the honour of the other. But the law does forbid the keeping or using any house or place for either of the purposes mentioned in s. 1, i.e., such a business as is described in the preamble of the Act. The management of such a business is in my judgment intended to be provided against and punished in those particular words of s. 3, under which it is sought to make the appellant responsible.

It has been argued that the meaning of s. 3 is, that the words "any person having the care or management of the business of any place used for the purposes aforesaid," applies to any person having the care or management even of a lawful business if any part of the place where it is carried on is used for the purposes of betting. I do not think so. I think that the meaning of the word "business" in s. 3 is the business of a betting-house keeper, and I am fortified in my opinion by the language of s. 1, which provides that no house shall be kept for the purposes of the owner and divers persons specified "betting with persons resorting thereto," and speaks of the "business thereof," i.e. the business of the house used for the purposes of betting. When I regard the object of the Act which was to suppress betting-houses, and when I know,

as a matter of common knowledge, that many such places were conducted by managers, and the object of the Act was to make the owner, occupier, keeper, and even servants responsible, if they took any part or share in the business of the betting-house, I do not think the Act was intended to apply to any person having the care or management of a lawful business who took no share or part in any illegality there. In my opinion the appellant was not liable to summary conviction under s. 3. There was ample evidence, if the justices chose to act on it, that the betting-men were using these grounds not only for the purpose of betting with all men resorting thereto, but also of receiving money by way of deposit. As regards them there was a clear case to be submitted to the justices, but no proceedings seem to have been taken against them. The police saw them but did not interfere. So much for the betting-men. I think also there was evidence to be submitted to the justices with respect to the owner of the ground, although I do not at all say how they should have found in the case. But in my judgment the defendant, having the care and management of the place, did nothing to render himself liable under the Act, and his mere knowledge of betting of an illegal character being carried on did not render him liable. I am of opinion that on the facts the conviction should be quashed.

SMITH, J. I am of the same opinion. If the learned recorder had not embarrassed himself with the cases of *Eastwood* v. *Millar* (1) and *Haigh* v. *Town Council of Sheffield* (2), and had acted on what seems to have been his own opinion he would not, I think, have affirmed the conviction. When we read the two sections carefully it is clear that the conviction was wrong. The appellant is manager of cricket and bicycle grounds, which are lawful, and lawful games were carried on there, and on the day in question, when there was a bicycle match, 20,000 persons assembled there, and amongst them were some betting-men. It is said that because the appellant was manager of the grounds, and there was some betting, he is liable under s. 3 to a penalty of 100*l*. I think, on reading the statute, that is not so. It is important to

(1) Law Rep. 9 Q. B. 440. (2) Law Rep. 10 Q. B. 102.

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read s. 1 first, and reading it disjunctively, as it ought to be read, it enacts that no place shall be opened, kept, or used for the purpose—First, "of the owner or occupier or keeper thereof, or any person using the same, betting with persons resorting thereto." Second, "of money being received by or on behalf of such owner, &c., for bets." Third, which is all important, "of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto." Therefore s. 1 deals with the house, and says, no house (by which I mean "place" as to which any question has been settled by decisions) shall be opened, kept, or used for the purpose of the owner or occupier or any person acting on his behalf, betting with persons resorting thereto; or for the purpose of any person having the care or management "betting with persons resorting thereto." That deals with a common gaming house, which may be made the subject of an indictment as a nuisance. Then s. 3, following the course of s. 1, enacts that any person who being the owner or occupier of any house, &c., or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them, viz: for the purpose of betting with persons resorting thereto,—Secondly, any person who being the owner or occupier of any house, &c., shall knowingly or wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, viz.: of betting,—Thirdly, any person having the care or management of or in any manner assisting in conducting the business of any house, &c., opened, kept, or used for the purposes aforesaid, viz.: of betting with persons resorting thereto,—shall be liable to a penalty. So s. 3 corresponds with s. 1, and is dealing with the same category of offences. Mr. Lloyd asks us to read it thus, "any person having the care or management of any place used for betting." But I think that is not the right way to read the words. If it were, any sweeper of the cricket ground might as a person assisting in the management of it be liable if persons made bets there. The intention of the legislature is to impose a penalty on the owner or occupier of the house; and on the owner or occupier who knowingly and wilfully permits any person to carry on the house, and what is more,

to prevent him having any servants to help him to carry on such a house. So the "business" must be an unlawful business. But the business of which the appellant had the care or management was perfectly lawful.

He does not come under paragraph 1 or paragraph 2 of s. 3, nor is he the manager of an unlawful business such as is described in s. 1. This view is clearly that taken by Lush, J., in *Haigh* v. *Town Council of Sheffield* (1), who evidently thought the construction which my Brother Hawkins puts on s. 1 was right, for Lush, J., says of s. 3, "It also speaks of any person having the management of the business." It is quite clear that the manager to be liable to conviction must be the manager of an unlawful business. Mr. Okes' Formulist, 6th ed. p. 104, generally accurate, is inaccurate in the form 3, given for a conviction of a manager, viz.: tha the "unlawfully had the care and management of [or were or was assisting in conducting the business of] a certain house, &c.," for he treats the words "the business of" as distinct from care, management, and attached to assisting only. So the form is wrong.

Judgment for the appellant.

Solicitor for appellant: *C. N. Longcroft.*
Solicitors for respondent: *Field, Roscoe, & Co.*

(1) Law Rep. 10 Q. B. 102, at p. 110.

J. R.

1884
June 17.

SUMMERS AND OTHERS, PETITIONERS; MOORHOUSE AND OTHERS, RESPONDENTS.

Municipal Corporation—Election of Aldermen—Voting Paper, validity of—Insertion of Wrong Name—Signature—Ambiguity—Parol Evidence—Municipal Corporations Acts, 1882 (45 & 46 *Vict. c.* 50), *s.* 60, *sub-s.* 4.

By the Municipal Corporations Act, 1882, s. 60, sub-s. 4, any person entitled to vote at an election of aldermen may vote "by signing and personally delivering at the meeting to the chairman, a voting paper containing the surnames and other names and places of abode and descriptions of the persons for whom he votes." A voting paper was delivered commencing, "I, the undersigned A. B.," and ending with the signature "C. D."; and upon a petition against the return of the persons elected, the commissioner received evidence shewing that the town clerk had inserted A. B.'s name in order that the voting paper might be used by him, but by inadvertence it was handed to C. D., who signed and personally delivered it to the chairman without discovering the mistake:—

Held, that the vote was valid, and that the commissioner was right in receiving evidence of the circumstances under which it was given.

CASE stated by a commissioner appointed to try a petition under the Municipal Corporations Act, 1882, against the return of the respondents as aldermen for the borough of Wakefield.

The petition prayed that it might be determined that the respondents were not duly elected, and that John Connor and Thomas Howden (two of the candidates of the election) were duly elected and ought to have been returned.

On the trial the following facts were admitted, or proved:—

At the election of aldermen for the borough of Wakefield, held on the 9th day of November, 1883, pursuant to the Municipal Corporations Act, 1882, s. 60, the four respondents were the liberal candidates, and John Connor and Thomas Howden were the conservative candidates. The number of vacancies to be filled up was four. The mayor acted as chairman at the election. Sixteen votes were recorded for each of the four respondents, and twelve votes for Connor and Howden respectively. There was, therefore, a majority of four votes for each of the respondents, who were declared by the chairman to be duly elected.

Eight of the voting papers which were counted in the majority for the respondents, and were partly printed and partly written,

when delivered to the chairman contained the names of two persons entitled to vote, one of which was inserted in writing at the top of such paper after the printed words, "I, the undersigned," and the other was written at the foot of such paper. The following is a copy (so far as is material) of one of those papers:—

"Election of Aldermen.
"Voting Paper.

"Borough of Wakefield, in the West Riding of the County of York.

"I, the undersigned, Francis Milthorp, being one of the members of the council of the said borough entitled to vote in the election of aldermen for the same borough, do hereby vote for the following persons to be aldermen of the said borough accordingly." [Here followed the christian names and surnames of the four respondents; their respective places of abode, and their respective descriptions.]

"Dated this 9th day of November, 1883.

"William Lee Sellars."

The other seven papers were, mutatis mutandis, to the same effect.

It was contended on behalf of the petitioners that the above-mentioned eight papers were void and invalid as voting papers, being uncertain and ambiguous, and that no evidence was admissible to explain the ambiguity, or to shew by what voters they were used, and the commissioner was of opinion, and found, that without such explanatory evidence such papers were void and invalid for the above reasons.

The respondents thereupon tendered evidence to shew the circumstances under which the voting papers were filled up, and the persons by whom they were signed and used, and contended that such evidence was admissible.

The commissioner admitted the evidence, which was to the following effect; all the eight papers were filled in at the top by the town clerk with the names of the respective voters by whom they were intended to be used. In this condition they were then handed by him to one Horner, who acted on behalf of the

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liberal voters. Horner thereupon inserted in each of the papers the names, place of abode, and description of each of the respondents as candidates, and having done this proceeded to distribute them among the respective voters by whom they were intended to be used, and in so doing he inadvertently handed each of the eight papers to a person other than the one whose name appeared on the top of such paper and to whom he intended to deliver it.

Each of the persons who so received a paper thereupon, without discovering the error, signed his name at the foot of it, intending by so doing to make it his voting paper, and to vote for the persons named therein, and after so signing his name, personally delivered it as such voting paper to the chairman, who then read out the names appearing at the foot of each paper as the names of the persons voting respectively for the candidates named therein.

The commissioner found as a fact that the above evidence was true, and held that the above-mentioned eight papers were valid voting papers, and that the respondents were duly elected.

The question for the opinion of the Court was whether the above evidence was admissible to explain the eight voting papers, or whether the voting papers were so ambiguous and contradictory as to render parol evidence to explain them inadmissible.

The parties agreed to the commissioner stating a case as a way of reserving the question for the opinion of the Court. He reserved his determination whether the respondents were duly elected or not, and whether Connor and Howden were duly elected and ought to have been returned, until the Court should have determined the question submitted, and expressed his intention of certifying in accordance with the decision of the Court.

Mattinson, for the appellants. The chairman ought not to have received Sellar's vote. There was an ambiguity upon the face of the voting paper which could not be removed by parol evidence. The Municipal Corporations Act, 1882, requires every vote to be in writing, but if parol evidence be admitted to explain ambiguities, the vote would be partly in writing and partly by parol.

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Cyril Dodd, for the respondents, was not heard.

MATHEW, J. I am clearly of opinion that our judgment should be for the respondents. The objection taken is that there was an ambiguity on the face of certain voting papers handed in to the chairman at the election from the fact that different names appear at the foot and in the body of the voting papers. It is necessary to refer to the Municipal Corporations Act, 1882, in order to determine whether the objection is good. By s. 60, subs. 4, every person entitled to vote may vote "by signing and personally delivering at the meeting to the chairman a voting paper containing the surnames, and other names, and places of abode, and descriptions, of the persons for whom he votes." It is, therefore, clearly the duty of the chairman to ascertain two things,—first, that it is a voter who delivers the voting paper, and, secondly, that he has signed it. In the present case Sellars, and the others whose votes were objected to, voted and signed their respective papers. I am of opinion that the requirements of the statute were complied with. At the trial of the petition the learned commissioner came to the conclusion that there was an ambiguity on the face of the voting papers, and finding an ambiguity, and nothing more, he received evidence in explanation of it. I am of opinion that the chairman was right in the first instance in declaring the respondents duly elected, and that the learned commissioner was perfectly right in receiving evidence of the circumstances under which the votes were given.

DAY, J., concurred.

Judgment for the respondents.

Solicitors for petitioners: *H. B. Clarke & Son, for Harrison & Beaumont, Wakefield.*

Solicitors for respondents: *Van Sandau, Cummings, & Armitage, for C. W. Hall, Wakefield.*

W. A.

1884
June 28.

[IN THE COURT OF APPEAL.]

MELVILLE AND OTHERS *v.* STRINGER.
HOUGHTON AND OTHERS CLAIMANTS.

Bill of Sale—Several Mortgagees—Consolidation of Securities—Form—Bills of Sale Act, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

A bill of sale which is in its terms so complicated as to substantially vary from the form in the schedule to the Bills of Sale Act, 1878, Amendment Act, 1882, is void by s. 9 of that Act, notwithstanding it may not contravene any of the other sections.

Therefore a bill of sale made between the grantor and four sets of mortgagees to secure different debts owing to each respectively at different times, with a declaration that in case of default in payment of any sum thereby secured or of any other default mentioned as a cause of seizure in s. 7 of that Act, it should be lawful for the mortgagees to seize and sell the goods assigned, was held by the Court of Appeal, reversing the decision of the Queen's Bench Division (12 Q. B. D. 132), to be not in conformity with the form in the schedule, and void.

Semble, the sum secured should be made payable on a specified day, and a bill of sale making it payable on demand is contrary to such form.

APPEAL from the decision of the Queen's Bench Division, affirming the judgment of the Wigan County Court judge, and giving judgment for the claimants.

The plaintiffs were the execution creditors of John Henry Stringer, and had seized goods under their execution which were claimed by Houghton, Hallmark, Smith and Edwardson under a bill of sale of the 1st of June, 1883, and the question was as to the validity of such bill of sale.

The bill of sale was made between Stringer of the first part, Houghton and Hallmark of the second part, Hallmark and Smith of the third part, Edwardson of the fourth part, and Houghton, Hallmark, Smith and Edwardson, thereinafter called the mortgagees, of the fifth part, whereby, after reciting that Stringer was indebted to Houghton and Hallmark in 387*l.* 0*s.* 3*d.* and had given them a bill of exchange for 19*l.* 15*s.* 3*d.* for part of such debt, and was also indebted to one Hughes in 250*l.*, and that Hallmark and Smith had joined with Stringer in giving to Hughes a promissory note to secure such 250*l.*, which note was

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payable by the instalments of 50*l.* on the 9th of April last, the sum of 100*l.* on the 9th of June next, and the sum of 100*l.* on the 9th of August next, and that 50*l.* had been paid, leaving 200*l.* due on the said note; and after reciting also that Stringer was indebted to Edwardson in 97*l.* 4*s.* 4*d.*, and that Houghton, Hallmark, Edwardson and Smith had agreed to lend Stringer the further sum of 150*l.* out of moneys belonging to them upon a joint account for the purpose of enabling Stringer to carry on his business at a certain hotel, and that Stringer had agreed to secure the payment of the 387*l.* 0*s.* 3*d.* due to Houghton and Hallmark and of the 97*l.* 4*s.* 4*d.* to Edwardson, and also the repayment of any sum which Hallmark and Smith, or either of them, might be called on to pay in respect of the said promissory note and also repayment of the 150*l.*, Stringer in consideration of the premises and of the 150*l.*, assigned to the mortgagees the goodwill, furniture and stock-in-trade of the hotel, to hold unto the mortgagees by way of security for the payment of the sums thereinafter covenanted to be paid with interest according to such covenants. Stringer covenanted with Houghton and Hallmark to pay to them on demand 294*l.* 4*s.* 10*d.*, part of the 387*l.* 0*s.* 3*d.*, and also to pay to them on the 8th of July next 92*l.* 15*s.* 5*d.*, the balance of the 387*l.* 0*s.* 3*d.*, with interest on both sums at 5*l.* per cent. per annum. He also covenanted with Hallmark and Smith to pay to them on demand such sum, if any, as they or either of them might be called upon to pay in respect of the promissory note, with interest thereon at the aforesaid rate, and also, so long as any principal money thereby covenanted to be paid should remain unpaid, to pay to Houghton and Hallmark interest thereon after the aforesaid rate. Stringer also covenanted with Hallmark and Smith to pay the two sums of 100*l.* due on the promissory note when they should become due, and at all times to keep indemnified Hallmark and Smith from the payment of the two sums of 100*l.* or any part thereof, and from all claims and demands on account thereof. Stringer also covenanted with Edwardson to pay to him on demand the 97*l.* 4*s.* 4*d.* with interest at the rate of 5*l.* per cent. per annum; and he also covenanted with the mortgagees to pay to them on the 1st of July next the 150*l.*, with interest in the meantime after the rate of 5*l.* per cent. per annum,

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and also, so long as any principal money remained due under the mortgage, to pay to them interest at the same rate by equal half-yearly payments on the 1st of June and the 1st of December in each year.

It was declared by the bill of sale that if default should be made in payment of any sum or sums thereby secured, or the interest thereof, at the respective times at which the same were thereinbefore covenanted to be paid, or if any other default or event mentioned as a cause of seizure in s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882, should be made or happen, then and in any such case, but not otherwise, it should be lawful for the mortgagees at any time thereafter to enter and seize, and sell, the property and pay the expenses and the 150*l.* and interest, and all the moneys owing on the said security, and as between the several mortgagees pro ratâ and in proportion to the amounts which should be owing to them respectively, and the surplus, if any, to Stringer.

The county court judge gave judgment for the claimants, upholding the bill of sale, and this judgment was afterwards on appeal affirmed by the Queen's Bench Division. (1)

The plaintiffs appealed.

Ambrose, Q.C., and *Woodard*, for the plaintiffs. The question is whether this bill of sale is in accordance with the form in the schedule to the Bills of Sale Act, 1878, Amendment Act, 1882 (45 & 46 Vict. c. 43), for s. 9 of that Act enacts that "a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed." This bill of sale is an attempt to amalgamate four bills of sale together, with a condition empowering all the mortgagees to enter and seize if default be made in payment of any of them. It is of a more complicated kind, and not so simple as required by the Act: *Davis* v. *Burton*. (2) By this bill of sale the mortgagor covenanted with some of the mortgagees to pay some of the debts on demand, whilst he covenanted with others to pay at specified

(1) 12 Q. B. D. 132.

(2) 10 Q. B. D. 414; and on app. 11 Q. B. D. 537.

dates. The demand might be made the next day after the bill of sale was given, and then the mortgagees might enter and seize the property, although the 150*l.* was not to be paid until the 1st of July, viz. one month after the bill of sale had been given. Sect. 7, which limits the power to seize to the cases there made, gives as one of such cases, in sub-s. (1), "if the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security," that cannot be said to mean to give a power to A. B. to enter and seize in default of payment to C. D. Besides, making the money payable on demand is not in accordance with the form in the schedule. That form stipulates for the payment of the money borrowed "on the day of ;" and it then adds in italics the following words between brackets "[*or whatever else may be the stipulated times or time of payment*]." That shews that the legislature intended that the payment should be at some time certain. Payable "on demand" is the same as "forthwith," and in *In re Williams, Ex parte Pearce* (1), where that word was used in the bill of sale, Bacon, V.C., said, "The grantee might here the very day after the execution of the bill of sale, or even on the day itself on which it was executed, enter and seize, and that would entitle him to the charges for seizing and taking possession. Then he might relinquish possession, and be entitled to claim not only interest at 5*l.* per cent. upon all the money due but also the charges for his execution, and he might do that as often as he might think fit. What an abuse would thus be made of the provisions of a bill of sale like this? It would put it in the power of the grantee to threaten the grantor every day for causes for which he is not entitled by the Act to threaten, and enforce his threats by entry and seizure." The Divisional Court considered that the covenants in default of which there was a power to enter and seize were necessary for the maintaining the security, and so within the latter part of sub-s. (1) of s. 7. That is not correct; the covenants for maintaining the security are not those for

(1) 25 Ch. D. 656, at p. 665.

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payment of different sums to the different mortgagees, but are for keeping up and preserving the property assigned. There is another provision in this bill of sale contrary to the form in the schedule, namely, the covenant to keep Hallmark and Smith indemnified from the payment of the two sums of 100*l.*, and from all claims and demands on account thereof.

French, for the respondents. This bill of sale is substantially in accordance with the form given in the schedule, and that only is what the Court of Appeal held necessary in *Davis* v. *Burton* (1). The Act does not mean nor did the Court there hold that this form must be strictly and literally complied with, for this would limit bills of sale to those by one grantor to one grantee. The form given in the schedule must necessarily be varied according to circumstances. This bill of sale contains nothing which is in violation of the sections of the statute, and therefore the form in this schedule has been substantially complied with. The covenants or agreements in the bill of sale necessary for maintaining the security cannot be, nor are they, confined to those for preserving the property itself which is assigned, but extend to all that may be reasonably done by the mortgagees for preserving the security. The expenses of a mortgagee in defending an action of ejectment have been allowed as coming within such category. The fact that the different mortgagees agreed to take one, instead of several bills of sale, cannot be a reason for making it void, and it certainly would have the advantage of saving expense. If such then was allowable, how could it have been better carried out than it is by this bill of sale?

[FRY, L.J. It might have been done by a bill of sale to a trustee with all the facts recited. Do you say that all the mortgagees must enter and seize if there be a default in the covenant with any one of them? Suppose one of the mortgagees was paid off, can the others compel him to join in the entry and seizure?]

It may be difficult to say how that would be. The rights of

(1) 11 Q. B. D. 537.

the parties must be left to the law, and if, as it would seem to be, the power of entry is only a joint one, and some of the mortgagees do not desire to exercise it, that would only be so much the worse for the others, and it is not a matter about which the mortgagor could complain. The provision, however, that if the separate debt due to one of the mortgagees is not paid, all the mortgagees may enter, is only necessary for maintaining the security, as otherwise one of the mortgagees would obtain priority over the others, and so defeat the security. There can be no objection to a sum being payable on demand. It is a mode of stipulating the time for payment, and is not contrary to the form in the schedule.

BRETT, M.R. I am prepared to reaffirm with the strongest enunciation the grounds on which *Davis* v. *Burton* (1) was decided in this Court, and which were, as it seems to me, that there was a rule of construction to be applied to this statute. That rule was expressed by me in these words, namely :—"Whatever may be thought of the wisdom of this legislation, I feel myself bound to come to the conclusion that the object of the statute was twofold ; first that the borrower should understand the nature of the security which he was about to give for the debt due from him ; and, secondly, that a creditor upon merely searching the register should be able to understand the position of the borrower, and should not be compelled to go to a solicitor in order to get counsel's opinion as to the meaning of a security already created by the borrower." In other words, what the legislature aimed at was that bills of sale should not be allowed to be in all the forms in which previously they had been allowed to be made, but that they should be in a form which was sufficiently simple in the first place for a borrower of ordinary understanding to know the nature of the security he had given for his debt, and secondly for a new proposed creditor to understand at once on searching the register and without taking counsel's opinion the meaning of the security and the true position of the borrower. That being the scheme of the statute the legislature has carried it out by certain sections,

(1) 11 Q. B. D. 537.

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and in addition thereto it has enacted, by s. 9, that the bill of sale "shall be void unless made in accordance with the form in the schedule to this Act annexed." That 9th section was expressly for the purpose of carrying out the principle I have enunciated, and in *Davis* v. *Burton* (1) I said that section "must mean that every bill of sale shall be substantially like," I did not say shall be word for word the same, but "substantially like the form in the schedule. Nothing substantial must be substracted from it, and nothing actually inconsistent must be added to it." Things, however, which may be reasonably included in the description given by the words in italics may be substituted for what is put down in the form. Consequently where in the form it is "witnesseth that in consideration of the sum of £ now paid to A. B. by C. D.," and there is added in italics "*or whatever else the consideration may be*," you may strike out £ , and put in a statement of whatever may be the legal consideration. The said A. B. then goes on to assign to C. D. the property described in the schedule "by way of security for the payment of the sum of £ ." Therefore, to comply with the form it must substantially be a security for the payment of the sum of money secured, and to the person for whom it is to be secured. The form afterwards goes on to say, "And the said A. B. doth further agree that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]." A question has arisen as to what may be the reasonable construction of those words in italics "*stipulated times or time of payment*" as to which I shall make an observation hereafter; but I do not think it necessary to discuss now what that construction may be, further than this, that there can be no agreement properly made for the payment which does not come within the description given by those words in italics.

Now the point we have here to determine is, whether the bill of sale in the present case is in accordance with that form. It is made between the proposed grantor and several other

(1) 11 Q. B. D. at p. 540.

parties for securing to each of those parties separately different debts of different amounts, borrowed at different times and payable at different times and under different conditions: and can it be said that such a bill of sale is in accordance with the form given by the Act; that it is in a form so simple that the borrower can understand the nature of the security he has given, and that a creditor by merely searching the register, and without being obliged to take counsel's opinion, can see the position of the borrower and what the security means? After the inability of the learned counsel engaged in this case to tell us what would clearly be the rights of the several parties under this security, it would be preposterous to say that this bill of sale is in any such simple form as I have described, and Mr. French was obliged to contend that a bill of sale, however intricate, and in whatever ingenious terms it might be framed, must be in accordance with the form in the schedule, and so not void by s. 9, if it was not shewn to be made in breach of any of the other enactments in the Act. If that contention could be upheld it would, as it seems to me, have the effect of striking s. 9 altogether out of the Act, which section, in my opinion, requires in addition to the bill of sale being void by reason of its being made in breach of any other enactment, that it should be in form with the simplicity which is there enacted. It was then said by the counsel for the claimants that the result of this would be that there could not be a loan by two partners, or to two partners, for the bill of sale in that case must necessarily be held to be not in accordance with the form in the schedule; but that is not so, for where two partners lend or borrow a sum of money it is practically one debt and one creditor, or one debtor as the case may be, and therefore the bill of sale would substantially be in the form in the schedule to the Act. So if the persons borrowing or lending were not partners but agreed jointly to borrow or to lend a sum of money, I do not think that that would make any difference, but it is not necessary to decide that in the present case, for where the sums are not jointly lent, but are different sums payable to separate creditors, and an attempt is made, as it is in this case, to join all in one bill of sale, there is such a complication of difficulties as to shew that the bill of sale is not in the

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simple form given by the Act, but is contrary to the form so given.

I think that this statute is one of those parental protective Acts which, however much some persons may dislike them, are passed sometimes by the legislature, and that it was intended to prevent an indigent man who wishes to borrow money from being obliged to comply with the terms which a man possessing money might impose on him. I think that the statute was intended to protect such indigent persons and also subsequent lenders, and in my opinion the bill of sale in the present case errs against this statute and is void. It has been argued also that the statute intended that the sum secured should be payable on a specified day, and it is said that it is not so with regard to this bill of sale, as it might be enforced if part of the money borrowed were not paid on demand; and it is said that money payable on demand cannot be in accordance with a reasonable construction of the words in italics, "*stipulated times or time of payment.*" Bacon, V.C., a great authority on subjects of this kind, held, in *In re Williams, Ex parte Pearce* (1), that a covenant to repay forthwith would not be in compliance with this form, and he gave strong and powerful reasons for his so holding. Though I do not think it necessary for the decision in the present case to determine whether a provision making the money borrowed repayable on demand would be contrary to the form given by the statute, and would therefore vitiate the bill of sale, I have a strong inclination to think that it would, for such a provision is not like one for payment at a fixed time, and would have the effect of preventing a second intending lender from knowing whether the bill of sale had been already put in force. However I give no opinion on this point. I found my judgment on this, that the bill of sale in this case has terms as to the separate loans and different parties to it, which are complicated to the last degree; and so it is contrary to s. 9, even though it may contain no stipulations which are inconsistent with any of the other sections. I do not, however, say that it has not such stipulations, but that, in my opinion, it is against the principle of the Act, and is void.

(1) 25 Ch. D. 656.

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BOWEN, L.J. I have come to the same conclusion. It seems to me that the validity or invalidity of the bill of sale depends on whether it complies with s. 9 of the statute. That section makes it void unless it be made in accordance with the form in the schedule, and therefore the simple question is whether this bill of sale is in accordance with that form. I think the true test of that is whether it is in substantial conformity with that form, as was decided by *Davis* v. *Burton*. (1) If complication is so introduced into the bill of sale that it substantially alters the form given in the schedule, then it does not conform with it, and the bill of sale is void. The principle which *Davis* v. *Burton* (1) has decided is, I think, that nothing is to be taken from that form or added to it which substantially makes a variation from it. If one examines the form, a substantial part of it is, as it seems to me, that property must be assigned to the person who finds the money, and that to such person repayment is to be made of the money borrowed; and therefore I do not think that a bill of sale is within the Act if the money is lent by one person and made repayable to another person, or if the property is assigned by it to one person, and the repayment is to be to another, nor if the assignment of the property is to one person to secure repayment to another. Mr. French has contended that that construction would exclude from the Act the case of a trustee to whom property has been assigned for securing the repayment of money for those beneficially interested therein. My answer is, that that is an illustration of what is struck at by this s. 9, which section is against any substantial variation of the form. If that is what that section means, can it be said that an assignment to parties who are not joint creditors when the repayment is not to be of the sum secured to those creditors jointly, but only of portions of such sum to each of them separately is in accordance with the form in the schedule? So far from it being such, I think it is inconsistent with that form, and is therefore invalid.

I wish to add that a question may arise, as has been pointed out, whether a sum payable on demand is within s. 7, subs. 1. I agree with the observations thereon of the Master of the Rolls

(1) 11 Q. B. D. 537.

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and of Bacon, V.C., in *In re Williams, Ex parte Pearce* (1), but as well as with respect to that as to the other points which have been raised, I reserve my opinion until it becomes necessary to decide them.

FRY, L.J. I entirely concur with the conclusion at which the other members of the Court have arrived. The real question is, I think, whether the bill of sale is substantially the same as the form in the schedule to the Act; and I agree with the rest of the Court that it is not. I may add that it appears to me the form requires that the real bargain should appear on the face of the document; and I am inclined to think that as it refers to "*the stipulated time of payment*," the intention of the legislature was that the document should be such that persons might learn from it what was the time of payment without regard to any contingency the happening of which could not be ascertained from the document itself. I, therefore, am inclined to think that a provision making the money payable on demand is not making it payable at a time stipulated for as required by the form.

One or two other points have been referred to which it is not necessary to determine for the purpose of this decision.

Judgment reversed.

Solicitor for appellants: *James Clemmet, Manchester.*
Solicitors for respondents: *Last & Sons.*

(1) 25 Ch. D. 656.

W. P.

[IN THE COURT OF APPEAL.]

1884
July 9.

MATHEWS *v.* OVEY.

Practice—Appeal from County Court—County Courts Act, 1875 (38 & 39 *Vict.* c. 50), s. 6—*Rules of Supreme Court*, 1883, *Orders XXXIX. and LII.*

An appeal from the decision of a county court judge should be by motion ex parte in the first instance, under the County Courts Act, 1875, s. 6, and not by giving notice of motion under Order XXXIX., rule 3.

Shapcott v. *Chappell* (12 Q. B. D. 58) questioned.

THIS action was brought under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), to recover damages for personal injury.

At the trial in the Bow County Court the judge left certain questions to the jury, and gave judgment for the defendant on their findings.

A motion was made to a Divisional Court on behalf of the plaintiff under s. 6 of the County Courts Act, 1875 (1), for a rule nisi for a new trial, on the ground that there was no evidence of contributory negligence on the part of the plaintiff which ought to have been left to the jury.

Manisty and Williams, JJ., refused a rule on the ground that the plaintiff ought to have proceeded by notice of motion, but gave leave to appeal in order that the practice might be settled.

The Court of Appeal granted a rule nisi.

Rose Innes, for the defendant, shewed cause. The rule was rightly refused in the Court below, for the plaintiff ought to have given notice of motion. The case is governed by the Rules of the

(1) 38 & 39 Vict. c. 50, s. 6, by which, "in any cause, suit, or proceeding, other than a proceeding in bankruptcy, tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the judge, at any time within eight days after the same shall have been made or given, to appeal against such order, ruling, direction, or decision, by motion to the court to which such appeal lies, instead of by special case, such motion to be ex parte in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings as to the court to which such motion shall be made shall seem fit."

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Supreme Court, 1883, Order XXXIX., rule 3, by which "every application for a new trial shall be by notice of motion, and no rule nisi, order to shew cause, or formal proceeding other than such notice of motion, shall be made or taken." It also comes within Order LII. rule 2, which provides that, "No motion or application for a rule nisi or order to shew cause shall hereafter be made in any action." This is clearly an application for a new trial within the meaning of the former rule, and the words "any action" in the latter rule, are wide enough to include an action tried in a county court. The effect of these rules is to repeal so much of 38 & 39 Vict. c. 50, s. 6, as provides that the motion shall be ex parte in the first instance. There was power to make rules for this purpose, for, as the motion is made in the High Court, the rules are made for regulating the procedure of the High Court of Justice, within the meaning of the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 17. In *Shapcott* v. *Chappell* (1) the Court held that Order XXXIX., rule 6, applies to county court appeals, and it follows that rule 3 also applies.

Ruegg, for the plaintiff, in support of the rule. There is no power to make rules which repeal an Act of Parliament, but even if there is such power, this is not the effect of these rules. The first County Court Act, 9 & 10 Vict. c. 95, gave no appeal. Afterwards a limited right of appeal by special case was given by 13 & 14 Vict. c. 61, s. 14, which provided that the appellant should in all cases give security for costs, and 38 & 39 Vict. c. 50, s. 6, gave a further appeal by motion. The effect of the contention on the other side would be to take away the power given to the Court by that section of imposing terms on granting the rule. By Order LII., rule 5, two clear days' notice of motion is to be given; the effect of that, if it applied, would be to shorten the period of eight days fixed by 38 & 39 Vict. c. 50, s. 6. The Orders preceding Order XXXIX. clearly refer to trials in the High Court only, and that Order must have the same application. Rule 1 cannot apply, for if it does, the appeal from a county court judge sitting without a jury, is to the Court of Appeal, which is contrary to the practice, and to the words of Order LIX., rule 1. Rules 2 and 4 can have no application to county court

(1) 12 Q. B. D. 58.

appeals. It follows that no part of the order applies. The word "action," in Order LII., rule 2, means an action as defined by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100, that is, "a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court;" this does not include an action in a county court, the mode of commencing which is regulated by 9 & 10 Vict. c. 95, s. 59. The present case comes within the second exception in Order LII., rule 3.

BRETT, M.R. I am sorry to be obliged to come to the conclusion at which I have arrived in this case, because I think it would be very useful if many of the rules made under the Judicature Acts were applicable to the case of appeals from county courts. As to this particular rule (Order XXXIX., rule 3), I cannot say that it is applicable. In *Shapcott* v. *Chappell* (1) it was held that rule 6 of that Order XXXIX. applied to appeals from county courts, and it seems to me that if rule 3 is not applicable, it follows that rule 6 does not apply, and the decision in that case was wrong. The question therefore is one of importance. By the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6, protection is given to a person who has obtained judgment in a county court, in this way, that the judgment cannot be challenged except by a motion made ex parte, and the rule is "to be granted on such terms as to costs, security, or stay of proceedings as to the Court to which such motion shall be made shall seem fit." Therefore under that section the party who succeeds at the trial cannot be called on to appear on the appeal, or to incur any costs until after the superior Court has had an opportunity of considering whether any case for granting a rule is made out, or whether any terms ought to be imposed; but if Order XXXIX., rule 3 applies, he must take proceedings and incur costs before the superior Court has had any opportunity of considering whether he ought to be obliged to do anything. It was argued for the respondent, first, that the judges, by rules of court, can take away this protection, and repeal a part of 38 & 39 Vict. c. 50, s. 6; and, secondly, that they have done so. The power to make rules of court is given by the Judicature Act, 1875 (38 & 39 Vict. c. 77),

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s. 17, and there may be some doubt whether this power applies to cases of appeals from county courts. On the one side it is said that the judges have power to make rules applicable to such cases because the motion is in the High Court, and on the other side it is said that the power is only given in respect of proceedings under the Judicature Acts. I confess that if it ever becomes necessary to determine whether the judges could apply Order XXXIX., rule 3, to appeals from county courts the question will require full argument and careful consideration, and at present I entertain some doubt, but it is not necessary to decide that point, because, assuming that the judges have power to apply the rule, it seems to me that they have not done so. No doubt the words of the rule in one sense are large enough to include such cases, but we must see from the context what the meaning is, and must look at the words of the other rules and of other orders.

Order XXXIX., rule 1, provides that "Every motion for a new trial . . . . shall be made . . . . (2) in every other cause or matter where there has been a trial . . . . with a jury to a Divisional Court," &c.; it is said that these words are large enough to include the case of a trial with a jury in a county court; but the rule goes on "and (3), where there has been a trial without a jury, by appeal to the Court of Appeal;" the words "in every other cause or matter," apply to and govern these words, and therefore if the second division of the rule applies to county court appeals, the third must apply also, and, if so, where the county court judge sits without a jury the appeal from him must be to the Court of Appeal. It is impossible that this can be the meaning, and it would be directly contrary to the express provisions of Order LIX., rule 1, by which appeals under s. 6 of the County Courts Act, 1875, are to be heard before Divisional Courts. I think, therefore, that the words "in every other cause or matter" in Order XXXIX., rule 1, do not apply to actions commenced in county courts. Then rule 2 provides that judges are not to sit on the hearing of motions for new trials in cases tried before themselves. That clearly cannot apply, for county court judges cannot sit in Divisional Courts. "The notice of motion" in rule 4 must mean the notice specified in rule 3; it

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is to be given within eight days if the trial is in London or Middlesex, and if elsewhere within seven days after the end of the circuit. It is obvious that this is an exhaustive rule, and that all trials in cases in which a new trial can be moved for under this rule must take place either in London, or Middlesex, or at the assizes. This, I think, is conclusive to shew that those who drew rule 3 only meant it to apply to the new trial mentioned in rule 4.

Then by Order LII., rule 2, "No motion or application for a rule nisi or order to shew cause shall hereafter be made in any action," and it is said that this is an action within the meaning of that rule; but we must look to the interpretation clause in the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 100), by which, "'Action' shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court." In the county court an action is not commenced by writ, and the rules made under the Judicature Acts do not prescribe how an action shall be commenced in a county court; that is provided for by 9 & 10 Vict. c. 95, s. 59. Therefore "action" in Order LII., rule 2, does not include an action commenced in a county court, and that rule does not apply. The misfortune of so holding is that Order XXXIX., rule 6, would not be applicable, for a new trial in that rule must mean the same as in rule 3, and it is impossible to say that the last part of rule 6 is applicable to a new trial on appeal from a county court.

It follows that we cannot agree with the decision of the Divisional Court in the present case, nor with the judgment in *Shapcott* v. *Chappell* (1). I do not see that the judgment there deals with the exact words of the rule. It gives a large interpretation, which, though beneficent, seems to me, with deference, to be like an attempt to legislate. I am therefore of opinion that by 38 & 39 Vict. c. 50, s. 6, the motion must be made in the Divisional Court ex parte. The present case stands thus; a motion has been made in the Divisional Court in accordance with 38 & 39 Vict. c. 50, s. 6, and the application was refused on the ground that notice ought to have been given; we must therefore hear the case on the merits. As to *Shapcott* v. *Chappell* (1), I will not bind

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myself to say that in some way or other the principle applied there might not properly be applied, but I am clearly of opinion that the Court could not properly apply Order XXXIX., rule 6.

BOWEN, L.J. I am of the same opinion, and I should not add anything but that this point has been more than once decided by a Divisional Court, and, as I differ from the view which they have adopted, I think it more respectful to state the grounds of my decision. I am of opinion that Order XXXIX., rule 3, does not apply to appeals from county courts under 38 & 39 Vict. c. 50, s. 6. It may be useful to consider shortly the history of appeals from county courts. By the first Act, 9 & 10 Vict. c. 95, no appeal was given, but the decision of the county court judge both on law and fact was final. Then 13 & 14 Vict. c. 61, s. 14, gave an appeal of a very special kind, and contained strict provisions as to security, and afterwards, by 38 & 39 Vict. c. 50, s. 6, an appeal by motion was given. We are now asked to construe Order XXXIX., rule 3, in a way that would alter 38 & 39 Vict. c. 50, s. 6, so as substantially to deprive the party who has been successful in the county court of the protection against being forced into litigation in the superior Court which that section has given him. Whether the rules of court could or could not affect this protection, as they would if they substituted notice of motion for an ex parte motion it is not necessary to decide. It is a question of gravity and importance, but the short answer to the argument on this point is that the rules have not done so. I agree that Order XXXIX., rule 3, applies only to trials in the High Court, and I will not again go through the points dealt with in the conclusive argument of the Master of the Rolls on the other rules. I agree with the Master of the Rolls that the decision in *Shapcott* v. *Chappell* (1) must be shaken; as to whether it could possibly be distinguished in any way I reserve my opinion until the question arises. As to Order LII., rules 2 and 3, I entirely agree with the Master of the Rolls. I think the Divisional Court were misled by a useful desire to apply the legislation dealing with the superior court to county court appeals, which the rules of court have not dealt with.

(1) 12 Q. B. D. 58.

FRY, L.J. I am of the same opinion. As to the question of the power to make rules I say nothing. It is worthy of grave consideration when it arises. I am of opinion that Order XXXIX., rule 1, does not deal with motions for new trials on appeal from county courts; the object of that order is to deal with new trials in the High Court. The observation made by the Master of the Rolls that where there was a trial without a jury the motion must be to the Court of Appeal, which would be inconsistent with Order LIX., rule 1, if county court appeals were included, is strong and urgent to shew that this is the right conclusion. I also think it is plain that the other rules of Order XXXIX. do not apply. As to Order LII., rule 2, I have come to the same conclusion, that it does not apply to motions for new trials on appeal from county courts. The only word used in that rule which could possibly apply is "action," but s. 100 of the Judicature Act, 1873, defines action as "a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court." Therefore "action" in Order LII., rule 2, means an action in the High Court. Rule 3 of the same order contemplates the survival in certain cases of motions for orders to shew cause, and I think this is exactly one of those cases. I have therefore come to the conclusion that the Divisional Court were wrong in holding that notice of motion should have been given, and we must now hear the case on the merits (1).

Rule discharged (2).

Solicitors for plaintiff: *Hurd & Upward.*
Solicitor for defendant: *John Hales.*

(1) The case was then heard on the merits. It turned entirely on the facts as to whether there was evidence of contributory negligence, and in the result the rule was discharged.

(2) Reported by P. B. Hutchins, Esq.

W. P.

1884
July 2.

BARNES & CO. *v.* TOYE.

Infant—Necessaries—Evidence.

Where an infant is sued for the price of goods supplied to him on credit, he may, for the purpose of shewing that they were not necessaries, give evidence that, when the order was given, he was already sufficiently supplied with goods of a similar description, and it is immaterial whether the plaintiff did or did not know of the existing supply.

Ryder v. *Wombwell* (Law Rep. 3 Ex. 90) dissented from.

MOTION for a new trial in an action by tailors for the price of clothes supplied to the defendant, who had raised the defence of infancy, to which the plaintiffs had replied that the goods supplied were necessaries.

Two questions were left to the jury by Smith, J., who tried the cause: 1st, whether the charges were excessive, and 2nd, whether the goods were necessaries. In directing the jury on the latter question the learned judge told the jury, "It does not matter the amount of clothes he (the defendant) had in his box, trunk, or wardrobe, that not having been communicated to the plaintiffs; it is quite immaterial, you must look at his position in life."

The jury found a verdict for the plaintiffs, and this application was made on the ground of misdirection.

T. J. Bullen, for the defendant. The jury ought to have been asked whether, looking at the supply of clothes that the defendant had, those supplied by the plaintiffs were necessaries for him. It is not disputed that they were suited to his position in life, but they were not necessaries, for there was evidence that he was amply supplied. The earliest definition of necessaries is in Co. Litt. 172 a, "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." The rule may be wider now, but the principle is the same. The jury ought to have been told to consider not only whether the clothes were suitable in point of quality, but also in point of quantity:

Burghart v. *Angerstein.* (1) To the same effect are cases from *Ford* v. *Fothergill* (2) (before Lord Kenyon in 1794) onwards, see *Cook* v. *Deaton* (3) and *Steedman* v. *Rose.* (4) The decision of the Exchequer Chamber in *Ryder* v. *Wombwell* (5), though not expressly overruling that of the majority of the Court below on this point, leaves it open on the ground that there is a conflict of authority, and that *Foster* v. *Redgrave,* cited in the note to *Ryder* v. *Wombwell* (5), was not brought to the notice of the Court of Exchequer.

Archibald, for the plaintiffs. The decision of the Court of Exchequer in *Ryder* v. *Wombwell* (5) is in point. The prior cases are some of them cases in which it was shewn that the tradesman knew he was dealing with an infant, and in others the defendant was either in statu pupillari or living with his parents. Even in such cases it is not a condition precedent to the right to recover that inquiry should been made as to defendant's circumstances: *Brayshaw* v. *Eaton.* (6) Necessaries include things purchased for use which are suitable to the station in life of the infant, though they may not be wanted for immediate use, or for bare subsistence: *Peters* v. *Fleming.* (7) This is further established by the contrast drawn in several cases between articles of use and of luxury, and in any case not the real but the apparent circumstances of the infant are to be looked at: *Dalton* v. *Gib* (8); *Burghart* v. *Hall.* (9)

T. J. Bullen did not reply.

FIELD, J. This is an action for goods sold and delivered to which the defendant has pleaded infancy at the time the contract was entered into. The plaintiffs have replied that the goods supplied were necessaries. Looking at the position in life of the defendant there is nothing to shew that the goods supplied were not of the class of necessaries, indeed the defendant does not dispute this, but he says the contract is one which does not bind him because he was already amply supplied with goods of the

(1) 6 C. & P. 690.
(2) 1 Esp. 211.
(3) 3 C. & P. 114.
(4) Car. & M. 422.
(5) Law Rep. 4 Ex. 32.
(6) 5 Bing. N. C. 231.
(7) 6 M. & W. 42.
(8) 5 Bing. N. C. 198.
(9) 4 M. & W. 727.

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Field, J.

same class. On this point, it appears by the judge's notes, evidence was called, but in summing-up the judge told the jury that they were not to take this into account, and the effect is the same as if he had rejected the evidence. The defendant complains of this as having led to a verdict against him. The direction of the learned judge is warranted by the decision of the Court of Exchequer in *Ryder* v. *Wombwell* (1), and at one time I thought it would be our duty to follow that decision. On looking, however, to the judgment of Willes, J., in the same case in the Exchequer Chamber, it appears that the point must be considered an open one, as there are conflicting decisions, and the case of *Foster* v. *Redgrave* (2), cited in a note to the report in the Exchequer Chamber, was not before the Court of Exchequer. In this conflict of opinion we must give our own judgment on the point. The law is that up to the age of twenty-one an infant is not permitted to bind himself by contract, but to this there are exceptions. From the earliest times an infant could bind himself to pay for his meat, drink, lodging, and other matters necessary for his sustenance, and in more modern times the rule is expressed generally that an infant may contract for the supply of necessaries suitable to his support in his station in life. It is further established, by *Burghart* v. *Hall* (3), that an infant may bind himself by a contract for necessaries supplied upon credit, though he have sufficient income to supply himself for ready money. In this state of things we have to deal with the question whether an infant can bind himself for things which are necessaries, in the sense of belonging to the class of necessaries, and being suitable to his position in life, if they are not really necessaries in the sense that he could do without them. In *Ryder* v. *Wombwell* (1) this point was decided in favour of the tradesman, for the Court there held (Bramwell, B., dissenting) that evidence to shew that the infant was already sufficiently supplied was properly rejected, as it was not proposed to shew that the plaintiff had knowledge of that fact. If there had been no authority against this decision I should have declined to go into the question whether it was right, but there is such authority, both in former and in

(1) Law Rep. 3 Ex. 90. (2) Law Rep. 4 Ex. 35, n. 8.
(3) 4 M. & W. 727.

modern times. In *Bainbridge* v. *Pickering* (1) and in *Brayshaw* v. *Eaton* (2) the question of whether the defendant was already provided with clothes was considered as pertinent to the inquiry whether those which the plaintiff supplied were necessaries, and the learned judges who heard the case of *Foster* v. *Redgrave* (3) could not distinguish that case from the two last-mentioned, which they accordingly followed. Under these circumstances I am of opinion that the question should have been left to the jury whether these were necessaries, taking into consideration not merely the character of the goods but the question whether the defendant was in possession of such a supply of goods of the same description that he was not in want of these. There must, therefore, be an order for a new trial.

MANISTY, J. I do not see how the learned judge who tried this case could have dealt with it otherwise than on the authority of *Ryder* v. *Wombwell* (4), and indeed I am not clear that that case is not binding on us, and should not be considered, if it is necessary to consider it, in the Court of Appeal. As my learned Brothers are of a different opinion I do not dissent from their judgment, though I am not inclined to give the same weight to the decision of Erskine, J., in *Brayshaw* v. *Eaton* (2) as they seem to think it entitled to.

LOPES, J. But for what has just been said by my Brother Manisty, I should have been prepared to say that I entertain no doubt that the jury were misdirected. I do not intend to go through the cases, but I will shortly state my view on the point raised. A contract by an infant for the supply of goods to him cannot be enforced unless the articles be necessaries, the policy of the law being directed to the protection of infants. In point of fact, a tradesman dealing on credit with an infant does so at his peril, and must lose his money (that is, if the infant does not voluntarily pay him) unless he can prove that the goods supplied were necessaries for the infant according to his station in life. That being the law we come to the question, What are necessaries? To determine this, we must take into account what

(1) 2 Wm. Bl. 1325.
(2) 5 Bing. N. C. 231; 7 Scott, 183.
(3) Law Rep. 4 Ex. 35, n. 8.
(4) Law Rep. 3 Ex. 90.

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Lopes, J.

the infant had at the time of giving the order. For example: a watch may be primâ facie in some cases a necessary, but if it turned out that the infant was already supplied with a watch or watches, the one ordered could not be a necessary. It is said, however, that, even if regard must be had to the supply which the infant has at the time of the order, where it is in the tradesman's knowledge that the infant is amply supplied, yet this is not so if the tradesman is ignorant of that fact. If this contention were correct, the protection given to the infant would depend entirely on what might be the state of knowledge of the tradesman, and one effect would be to deprive the infant of the protection intended to be extended to him by the law. In my view it is immaterial whether the plaintiffs did or did not know of the existing supply, just as it is immaterial whether they did or did not know that the defendant was a minor. In this particular case evidence as to the amount of clothes the defendant possessed at the time when the order relied on was given was admissible, and the jury should have been told that in arriving at a conclusion whether the goods supplied by the plaintiffs were necessaries or not, they should consider whether the defendant was already sufficiently supplied. Against this view the authority of *Ryder* v. *Wombwell* (1) has been cited, and it has been suggested that this Court is bound by the decision in that case, being that of a Court of co-ordinate jurisdiction, and also the last decision on the point. I agree, however, entirely with my Brother Field that, looking at the conflict of authority, and the fact that the judges who reviewed that case in the Exchequer Chamber carefully, as it seems to me, kept open the point now raised, it is open to us to use our own judgment. Under these circumstances I think that we ought to act upon the decision in *Foster* v. *Redgrave* (2), and the long chain of authorities on which it was founded.

Order for a new trial.

Solicitor for plaintiffs: *J. L. Blaxland.*
Solicitor for defendant: *T. R. Watson.*

(1) Law Rep. 3 Ex. 90.

(2) Law Rep. 4 Ex. p. 35, n. (8).

A. M.

1884
June 10.

IN RE LUDMORE.

Bankruptcy—Practice—Sheriff's Fees—Poundage—"Costs of Execution"—Bankruptcy Act, 1883, *s.* 46, *subss.* 1, 2.

When the bankruptcy of a judgment debtor supervenes after seizure, but before sale, by the sheriff under a writ of fi. fa., the sheriff is not entitled to poundage under the words "costs of execution" in subs. 1 of s. 46 of the Bankruptcy Act, 1883.

THIS was a special case stated for the opinion of the High Court pursuant to s. 97 of the Bankruptcy Act, 1883, by the judge of the County Court of Warwickshire, holden at Birmingham.

The material facts were as follows:—

On the 16th of January, 1884, a writ of fi. fa. was lodged by a judgment creditor with the sheriff of Warwickshire, directing him to levy on the goods and chattels of the judgment debtors, William Ludford and John Ludford, the sum of 138*l.* 18*s.* and 2*l.* 2*s.* 8*d.* for costs, and also interest on 138*l.* 18*s.* at 4 per cent. per annum from the 16th January, 1884, until payment.

On the 17th of January the sheriff levied on the goods and chattels of the judgment debtors at two separate places, and remained in possession till the 21st of January.

On the 20th of January the judgment debtors filed a petition in bankruptcy in the Birmingham County Court, and on the 21st of January a receiving order was made against the judgment debtors.

On the 21st of January notice that the receiving order had been made was served on the sheriff, and he, pursuant to s. 46 of the Bankruptcy Act, 1883, delivered up to the official receiver the goods and chattels of the judgment debtors which he had taken in execution, but claimed to be entitled under s. 46 to the following costs of execution, viz.:—

	£	*s.*	*d.*
Levy fee	1	1	0
Mileage	0	18	0
Possession money (two men six days)	3	0	0
Poundage	4	12	5

The official receiver, on behalf of the debtors' estate, objected

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that as there has been no sale or realization the sheriff was not entitled to poundage, but admitted the validity of the remaining charges. The goods seized were sold by the official receiver, and, after allowing to the bankrupts articles to the value of 20*l.*, as provided by s. 44 of the Bankruptcy Act, 1883, realized the sum of 72*l.* 9*s.* 11*d.*

The question for the opinion of the High Court was whether, under the circumstances stated, the sheriff was entitled to poundage; and for the purposes of the special case the official receiver was to be deemed to be the appellant, and the sheriff was to be deemed to be the respondent.

Chalmers, for the official receiver. The question turns on the true construction of the words "costs of execution" in the 1st sub-section of the 46th section of the Bankruptcy Act, 1883. The same words occur in the 2nd sub-section of the same section, but they do not bear the same construction in both sub-sections. In the 2nd sub-section those words undoubtedly carry poundage, because that sub-section applies when an execution has been perfected by sale; but they do not in the 1st sub-section, because the latter sub-section is dealing with another stage of the proceedings. Poundage is in the nature of a commission, and does not become payable unless and until an execution has been made fructuous either by being paid out or by a sale: *Rex* v. *Robinson* (1); *Miles* v. *Harris* (2); *Mortimore* v. *Cragg* (3); *Re Craycraft* (4). That was the settled practice prior to the present Act, and is not altered by the 1st sub-section of the 46th section, merely because, by the intervention of the statute, the execution has been rendered inchoate and unfruitful. Therefore the right to poundage has not arisen.

Wills, Q.C., and *Macaskie*, for the sheriff. It is admitted that the settled practice has been that a sheriff is not entitled to poundage unless the execution has been made fructuous, but it is contended that under the present Bankruptcy Act he is put on a better footing; and that sub-ss. 1 and 2 of s. 46 must be read together, and as the words "costs of execution" in the 2nd sub-section admittedly carry poundage, they must bear the same

(1) 2 C. M. & R. 334.
(2) 12 C. B. (N.S.) 550.
(3) 3 C. P. D. 216.
(4) 8 Ch. D. 596.

meaning in the 1st sub-section. If they do not, the sheriff will get no costs or remuneration whatever, because the other fees allowed are fees payable to the bailiff. Poundage is "a cost of the execution" although not an expense, and the right to it arises on the seizure and not on the sale. The amount is regulated by the sale. In *Armitage* v. *Jessop* (1) it was included in the costs of the execution.

Chalmers, in reply, was not called upon.

CAVE, J. I am of opinion that the arguments for the official receiver must prevail. As a general proposition of law it is undoubted that a sheriff is entitled to poundage when he has obtained some money for the execution creditor by operation of law, whether he gets it by selling the goods he has seized or by the debtor or some one on his behalf paying him out to prevent a sale. But no case can be found in which it has been held that a sheriff is entitled to poundage until he is in that position. That being the general rule, the Act of Parliament provides (s. 46, sub-s. 1) "where the goods of a debtor are taken in execution, and before the sale thereof, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge." Now what are the "costs of the execution" there intended to be dealt with? I apprehend that expression must be governed and construed by the general rule, and that if the sheriff has not made a sale he is not entitled to poundage. On the other hand where the goods have been sold under the execution, he will under the 2nd sub-section be entitled to poundage. It is said that the object of the section was to improve the position of the sheriff, and I have little doubt that that was one of the objects; but I cannot discover anything in the section which shews an intention to give him that which under no other circumstances he would be entitled to have. Another reason for the distinction between the two sub-sections

(1) Law Rep. 2 C. P. 12.

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is this, that where the goods are not sold there would be very great difficulty in ascertaining what amount of poundage the sheriff was entitled to, because poundage is a percentage or commission on the amount obtained by the sale. I am satisfied that the legislature did not intend that the sheriff should under the words "costs of execution" in the 1st sub-section be entitled to poundage. This appeal therefore succeeds. As to the costs of the appeal, it has been intimated to me that this is a representative case and that no costs are asked for, and therefore I say nothing about them.

Appeal allowed.

Solicitor for appellant: *Solicitor to the Board of Trade.*
Solicitors for respondent: *Taylor, Hoare, & Co.*

H. L. F.

June 13.

[IN THE COURT OF APPEAL.]

EX PARTE CUNNINGHAM. IN RE MITCHELL.

Bankruptcy—Bankruptcy Petition—Domicil of Debtor—Onus of Proof—Officer in British Army serving out of England—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 1 (*d*).

Sub-s. 1 (*d*) of s. 6 of the Bankruptcy Act, 1883, enacts that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless (inter alia) "the debtor is domiciled in England":—

Held, that this must be taken to mean domiciled in England, as distinguished from Scotland or Ireland.

The onus is, in the first instance, on the petitioning creditor to prove the domicil, though he may adduce such primâ facie evidence as will throw the burden of disproving the domicil on the debtor.

But the mere fact that the debtor bears an English name, and is an officer in the British army, does not raise any presumption that his domicil is English as distinguished from Scotch or Irish, inasmuch as his domicil of origin might have been Scotch or Irish, and in either of those cases he would not by entering into the British army have lost his domicil of origin.

Yelverton v. *Yelverton* (1 Sw. & Tr. 574), and *Brown* v. *Smith* (15 Beav. 444), approved and followed.

The cases relating to Anglo-Indian domicil commented on and explained.

APPEAL from the dismissal, by Mr. Registrar Hazlitt, of a bankruptcy petition presented by Andrew Cunningham against Edward Mitchell.

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The debtor was a Lieutenant-Colonel in Her Majesty's Royal Engineers, and had been since September, 1881, commanding the Royal Engineers in Guernsey and Alderney, having an official residence in Guernsey.

On the 5th of September, 1882, Mitchell commenced an action for damages against Cunningham in the Queen's Bench Division. Cunningham delivered a counter-claim for 16*l.* At the trial the jury could not agree as to Mitchell's claim, but gave a verdict for the 16*l.* for Cunningham on the counter-claim, and judgment was entered accordingly, with costs. The costs were taxed at 119*l.* In the writ issued by Mitchell in this action he was described as "of No. 17, Glendower Mansions, Harrington Road, South Kensington, in the county of Middlesex," and in an affidavit sworn by him in the action, on the 9th of March, 1883, he was described in the same way. The bankruptcy petition was presented on the 7th of March, 1884, and was founded on the judgment debt and costs (amounting to 135*l.*) in respect of which a bankruptcy notice had been served on Mitchell, with which he had failed to comply. The notice and the petition were, by the leave of the court, served on him in Guernsey. The petitioning creditor's solicitor made an affidavit in which he said, that, to the best of his knowledge and belief, the debtor was domiciled in England, and that the head quarters of the Royal Engineers were at Chatham. In another affidavit the solicitor said that the debtor was residing at his official residence in Guernsey. The debtor made an affidavit, on the 26th of May, 1884, in which he said that from the 8th of September, 1881, when he commenced his official duties in Guernsey, down to the date of his affidavit he had resided at his official residence in Guernsey, and had had no other residence, and that the head quarters of the Royal Engineers as to the Guernsey district were in Guernsey. He said, also, that he had occasionally during the above-mentioned period obtained leave of absence, and upon such few occasions had temporarily stayed at No. 17, Glendower Mansions, South Kensington, which was an hotel.

The Registrar dismissed the petition on the ground that the debtor was not domiciled in England, and that within a year before

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the presentation of the petition he had not ordinarily resided nor had a dwelling-house or place of business in England.

The petitioning creditor appealed.

On the hearing of the appeal it was stated (though there was no evidence to that effect) that the debtor was by birth an Irishman, and the argument proceeded on that assumption.

Lyon, for the appellant. The debtor's own evidence in the action shews that he had ordinarily resided or had a dwelling-house in England within a year before the date of the petition, and in this way the requirements of s. 6, sub-s. 1 (*d*) (1) of the Bankruptcy Act, 1883, are satisfied. But, at any rate, as he is an officer holding a commission in the British army, he is necessarily for that reason a domiciled Englishman, whatever his domicil of origin, even if he was by birth a Scotchman or an Irishman.

[*Sidney Woolf*, for the debtor, referred to Dicey on the Law of Domicil, p. 139.]

He must have an English domicil, though his domicil of origin may be retained for some purposes.

[BAGGALLAY, L.J. How can he have two domicils? The point appears to be decided against you by *Yelverton* v. *Yelverton* (2) and *Brown* v. *Smith* (3).

COTTON, L.J. *Yelverton* v. *Yelverton* (2) seems to be exactly in point.]

A Scotchman by birth, who entered the military service of the East India Company, acquired an Anglo-Indian domicil. If he left the service and returned to his own country his domicil of origin reverted, unless he had shewn an intention of abandoning it: *Forbes* v. *Forbes* (4).

[COTTON, L.J. Does that apply to a Scotchman entering the British Army?]

There are similar decisions in the case of officers entering the military service of a foreign sovereign: *Ommaney* v. *Bingham* (5);

(1) Sect. 6 (1). "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless (inter alia) (*d*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England."

(2) 1 Sw. & Tr. 574.

(3) 15 Beav. 444.

(4) Kay, 341.

(5) House of Lords, cited 5 Ves. 757.

Hodgson v. *De Beauchesne* (1); *Somerville* v. *Somerville* (2). The domicil of origin always remains to this extent, that, when the officer resigns his commission, it reverts at once. For the present purpose a Scotchman or an Irishman stands in the same position as a foreigner: *Bruce* v. *Bruce* (3). In *Yelverton* v. *Yelverton* (4) the question was as to the jurisdiction of the Divorce Court. A man may have one domicil for the purpose of succession to property, and another for the purpose of founding the jurisdiction of an English Court. Under the circumstances the onus is on the debtor to shew that he is not a domiciled Englishman.

Sidney Woolf, for the debtor, was not heard.

BAGGALLAY, L.J. (after referring to subs. 1 (*d*) of s. 6.) It appears to me that it is not established that the debtor, "within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or place of business in England." But the question remains whether he is domiciled in England, and I am of opinion that the onus is on the petitioning creditor to shew that the debtor is domiciled in England. I can quite conceive that there may be cases in which there is such an amount of primâ facie evidence of an English domicil as to shift the burden on to the respondent. But all the evidence we have in the present case is, that the debtor bears a name which might be that either of a subject of Her Majesty or of a citizen of the United States of America, and that he holds a commission in the military service of the Queen. That he might hold if his domicil was Scotch or Irish, or possibly even Indian. It has been argued that the mere fact that a man is serving the Queen of England in her army makes him an Englishman, though his domicil of origin was Scotch or Irish. I cannot assent to this. The present case has been argued on the assumption that the debtor's domicil of origin was Irish. The rules of law on the subject may be arranged under three heads: (1), a subject of Her Majesty entering into the military or naval service of a foreign power acquires a domicil in the country of that power; (2), a subject of Her Majesty entering into Her Majesty's military or naval

(1) 12 Moo. P. C. 285.
(2) 5 Ves. 750.
(3) Cited, 5 Ves. 761; 2 B. & P. 229, n.
(4) 1 Sw. & Tr. 574.

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service does not thereby lose his domicil of origin, which may be English, or Scotch, or Irish; (3), there are some anomalous cases in which a subject of the Queen had entered into the service of the old East India Company, and it was held that he had acquired what was called an Anglo-Indian domicil. Such cases can hardly arise now, because the separate government of the East India Company is at an end, and the army in British India is now part of the Queen's army. Perhaps they rather depended on the notion that the officer had entered into the service of a quasi foreign power. But I think the second of the rules which I have mentioned applies to the present case. Whether Colonel Mitchell's domicil of origin was Scotch or Irish when he entered the service of the Queen he did not thereby lose his domicil of origin. If, as has been assumed, his domicil of origin was Irish, he has never forfeited that domicil. The petitioning creditor therefore, has not established that which sub-s. 1 (*d*) of s. 6 requires, and the registrar's decision was right. The case of *Hodgson* v. *De Beauchesne* (1) was a very peculiar one. The testator in that case went to India in the military service of the East India Company, and thus acquired an Anglo-Indian domicil. He returned to England on furlough, and while on furlough he went to reside in France and died there. He had while residing in France acquired the brevet rank of major-general in Her Majesty's army, and, being still an officer in the Indian army, he was always liable to be recalled to India on active service. It was held that the presumption raised by his residence in France of an intention to put off his English domicil and acquire a French domicil was rebutted by the other facts, it being incompatible with his duty as an officer to acquire a domicil in a foreign state.

Cotton, L.J. I agree in the reasons which have been expressed by Baggallay, L.J., but I think it right to add a few words. It is not suggested that the debtor has within a year ordinarily resided or had a place of business in England. It is said that in the writ and in an affidavit in the action he described himself as of "No. 17, Glendower Mansions, South Kensington." It

(1) 12 Moo. P. C. 285.

turns out that that house is an hotel, and, though a man might ordinarily reside at an hotel, his going there occasionally would not make it his dwelling-house.

The great contest, however, has been on the question of domicil. I agree that the onus of proof is on the petitioning creditor, though of course there might be cases in which there was primâ facie evidence to shift the burden. I am of opinion that "domicil in England" means in England as distinguished from Scotland and Ireland as well as from foreign countries, because Scotland and Ireland have their own separate legal tribunals. It is meant that the debtor's domicil must be strictly in England, as distinguished from other parts of the United Kingdom. What is the primâ facie evidence in the present case? The debtor is an officer in the Royal Engineers, the head-quarters of the Engineers being at Chatham. It is said that this establishes that his domicil is English. I am of opinion that that conclusion is erroneous. No doubt, if a foreigner enters the British army and resides in England his domicil will be in England. But is there in the present case any primâ facie presumption that the debtor's domicil is in England? It is said that a Scotchman by entering the service of the East India Company acquired an Anglo-Indian domicil. I take exception to the expression "by entering the service" of the East India Company. The ground of the decisions in those cases was that the officer was residing in India under circumstances which shewed that he intended to abandon his domicil of origin, under circumstances which rendered it his duty to reside there permanently. It was not the entering the service, but the residence in India under circumstances which required him to remain there, which caused the change of domicil. This is really what was said by Wood, V.C., in *Forbes* v. *Forbes* (1): "When an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be animo et facto in India." A Scotchman entering into the British army does not by that fact alone acquire a different domicil. His

(1) Kay, p. 356.

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residence in England is only a temporary one for the purpose of discharging his military duties. All we know in the present case is that the officer holds a commission in the Engineers, and his residence in Guernsey is merely for the purpose of discharging his duty as an officer. That duty does not require his permanent residence at Chatham. The point was really decided in *Yelverton* v. *Yelverton* (1), and in *Somerville* v. *Somerville* (2) it was assumed that the mere acceptance by a Scotchman of a commission in the English army did not make him lose his domicil of origin. I am of opinion that those cases were rightly decided. It is said that this view is contrary to the cases in which a Scotchman has entered into the Russian or Dutch military service. But it was not the mere fact of entering into the foreign service, but the going to Russia or Holland under circumstances which would require the officer to reside there permanently, which brought about the change of domicil. All that was decided in *Hodgson* v. *De Beauchesne* (3) was this, that an officer in the English army who was also in the service of the East India Company, could not while he was in those services acquire a domicil in a foreign country, because that would be inconsistent with the duty which he owed to the Queen and to the East India Company. In my opinion the decision of the registrar was right.

LINDLEY, L.J. I am of the same opinion. It is incumbent on the petitioning creditor to prove, if it is disputed, that the conditions prescribed by sub-s. 1 (*d*) of s. 6 exist. Upon the facts it is pretty plain that Colonel Mitchell has not, within a year before the date of the presentation of the petition, ordinarily resided or had a dwelling-house in England. The evidence shews that his residence at Kensington was a temporary one at an hotel. It is said, however, that he is domiciled in England, and the first question is, on whom is the onus of proof? I think it is on the petitioning creditor. Has he discharged it? It is true that the debtor has an English name, and that he is an officer in the English army. But these circumstances alone do not raise any presumption that his domicil is English, as distinguished from Scotch or Irish, though, it may be, they raise a presumption that

(1) 1 Sw. & Tr. 574. (2) 5 Ves. 750. (3) 12 Moo. P. C. 285.

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Lindley, L.J.

he is a British subject. It is said that, whether his domicil of origin was Scotch or Irish, it became English by his entering into the English army, and in particular by his entering the Royal Engineers whose head quarters are at Chatham. I think that this is not a correct view of the law. This depends on whether that which Mr. Dicey says in his book correctly represents the result of the authorities. He says, p. 139: "A soldier or sailor in the service of his own sovereign retains the domicil which he had on entering the service, wherever he may be stationed," and he refers to *Yelverton* v. *Yelverton* (1) and *Brown* v. *Smith* (2). I think that his statement is fully borne out by those authorities. The point appears to me perfectly plain. It is not suggested that those cases have been overruled, but reliance has been placed on the cases relating to Anglo-Indian domicil. Those cases were anomalous and exceptional, and the theory of them is not very clear. I think it was correctly explained by Turner, L.J., in *Jopp* v. *Wood* (3). He said: "At the time when those cases were decided the government of the East India Company was in a great degree, if not wholly, a separate and independent government, foreign to the government of this country; and it may well have been thought that persons who had contracted obligations with such a government for service abroad could not reasonably be considered to have intended to retain their domicil here. They in fact became as much estranged from this country as if they had become servants of a foreign government." Looking at what the Lord Justice there says, and at what Wood, V.C., said in *Forbes* v. *Forbes* (4), it may well be that the fact of residence in the East Indies may have introduced an anomaly into the law of domicil. While they were law those cases very much confused the English law of domicil, and they were always anomalous cases. But, when we are asked to say that, by merely entering into the English army, an Irishman loses his domicil of origin, I think there is no authority for the proposition.

Appeal dismissed.

Solicitor for creditor: *E. R. Keele.*

Solicitors for debtor: *Lewis & Lewis.*

(1) 1 Sw. & Tr. 574.
(2) 15 Beav. 444.
(3) 4 D. J. & S. 623.
(4) Kay, 341.

W. L. C.

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June 13.

[IN THE COURT OF APPEAL.]

EX PARTE CLARK. IN RE CLARK.

Bankruptcy — Bankruptcy Petition—Scheme of Arrangement—Approval of Court—Reasonableness—Discharge of Debtor left to Discretion of Committee of Inspection—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 18.

A scheme for the arrangement of the affairs of debtors who had presented a bankruptcy petition, duly assented to by the creditors, as provided by s. 18 of the Bankruptcy Act, 1883, contained, inter alia, provisions for the appointment of a trustee and a committee of inspection, and also a provision that "the debtors shall be discharged when the committee of inspection shall so resolve":—

Held, that the latter provision was not in accordance with the intention of the Act, and was unreasonable, and that, though the debtors asked that the scheme might be approved by the Court, the approval ought not to be given.

APPEAL from the refusal of Mr. Registrar Murray to give the approval of the Court, under s. 18 of the Bankruptcy Act, 1883, to a scheme of arrangement which had been duly accepted and confirmed by the creditors of Clarissa Clark and George Clark.

The debtors, who had carried on business in partnership as bookbinders, presented a bankruptcy petition under the Bankruptcy Act, 1883. At the first meeting of the creditors the debtors proposed a scheme of arrangement, which was accepted by the creditors by a special resolution (as provided by sub-s. 1 of s. 18) and was confirmed by a resolution passed (as provided by sub-s. 2 of s. 18) at a subsequent meeting of the creditors, held after the public examination of the debtors had been concluded (in accordance with sub-s. 3 of s. 18). The debtors then applied to the Court for an order approving the scheme. The official receiver (as provided by sub-s. 5 of s. 18) made a report to the Court.

The scheme provided (inter alia):—

(1.) That Mr. A. A. James be appointed trustee under the scheme to administer the debtors' property and manage their business, at such remuneration as the committee of inspection might fix.

(3.) That Mr. Henry Spicer, Mr. A. W. Bentley, and Mr. J. Ichenhauser (three of the principal creditors) be appointed a

committee of inspection, for the purpose of superintending the administration of the debtors' property, and the management of their business by the trustee.

"(4.) All the property of the debtors divisible amongst their creditors shall vest in the trustee.

"(5.) The trustee shall carry on and manage the business of the debtors under the direction and superintendence of the committee of inspection for such time as may be determined by the committee.

"(6.) The trustee shall, if the committee of inspection at any time so direct, cease to carry on and manage the said business, and shall sell or otherwise dispose of the same, and the said property or any part thereof, in such manner and on such terms as the committee of inspection may from time to time direct.

"(9.) The debtors shall and will aid to the utmost of their power the realization of their property and the carrying on or sale of their business, and the distribution of the proceeds among their creditors, and shall be discharged when the committee of inspection shall so resolve."

The report of the official receiver contained the following statements:—

"That, having regard to s. 28 of the Act, the official receiver reports that he has no reason to believe that the debtors have committed any misdemeanor under this Act, or part 2 of the Debtors Act, 1869, or any amendment thereof, and that no facts have come to his knowledge which induce him to believe that the debtors have committed any of the offences referred to in sub-s. 3.

"That by the 9th paragraph of the scheme it is provided that the debtors shall be discharged when the committee of inspection shall so resolve.

"The official receiver submits to the Court that, as there is no provision in the Bankruptcy Act, 1883, by which creditors are empowered to suspend or grant the discharge of the debtors, such power ought not to be conferred on the committee of inspection in this case."

The Registrar was of opinion that the provision with regard to the discharge of the debtors was not authorized by the Act, that

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it was ultra vires the creditors, and that it was therefore not reasonable, and he accordingly declined to approve of the scheme.

The debtors appealed.

Sidney Woolf, for the debtors. The Registrar was of opinion that the creditors could not suspend the discharge of the debtors, that their future property must be absolutely discharged. But there is nothing in the Act to prevent the debtors and the creditors from agreeing that the debtors' after-acquired property shall be applied in payment of their debts. That is really the effect of the postponement of the debtors' discharge. Sect. 18 is very general in its terms; it does not say what such a scheme of arrangement is to contain, except that its terms are to be reasonable and calculated to benefit the general body of the creditors (1).

Why cannot a debtor and his creditors come to an agree-

(1) Sect. 18 provides: "(1.) The creditors may at the first meeting or any adjournment thereof, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them from the debtor, or a proposal for a scheme of arrangement of the debtor's affairs.

"(2.) The composition or scheme shall not be binding on the creditors unless it is confirmed by a resolution passed (by a majority in number representing three fourths in value of all the creditors who have proved) at a subsequent meeting of the creditors, and is approved by the Court."

"(5.) The Court shall, before approving a composition or scheme, hear a report of the official receiver as to the terms of the composition or scheme and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.

"(6.) If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme."

"(8.) A composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy."

"(10.) The provisions of a composition or scheme under this section may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court.

"(11.) If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court, on satisfactory

ment that, instead of his being adjudged a bankrupt, which they have power to insist on, he shall hand over to them all his property present and future, until such time as they shall think fit to discharge him? And, if they can do this, why cannot they

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evidence, that the composition or scheme cannot in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme, but without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done under or in pursuance of the composition or scheme. Where a debtor is adjudged bankrupt under this sub-section any debt provable in other respects, which has been contracted before the date of the adjudication, shall be provable in the bankruptcy.

"(12.) If, under or in pursuance of a composition or scheme, a trustee is appointed to administer the debtor's property or manage his business, Part V. of this Act shall apply to the trustee as if he were a trustee in a bankruptcy, and as if the terms 'bankruptcy,' 'bankrupt,' and 'order of adjudication,' included respectively a composition or scheme of arrangement, a compounding or arranging debtor, and order approving the composition or scheme.

"(13.) Part III. of this Act shall, so far as the nature of the case and the terms of the composition or scheme admit, apply thereto, the same interpretation being given to the words 'trustee,' 'bankruptcy,' 'bankrupt,' and 'order of adjudication,' as in the last preceding sub-section."

Sect. 28 enables the Court in a bankruptcy either to grant or refuse an absolute order of discharge to the bankrupt, or to suspend the operation of the order for a specified time, or to grant an order of discharge, subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property; "Provided always that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanor under this Act or Part II. of the Debtors Act, 1869, or any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge subject to such conditions as aforesaid."

Sect. 28 is in Part I. of the Act.

By s. 44, "The property of the bankrupt divisible among his creditors and in this Act referred to as the property of the bankrupt . . . shall comprise the following particulars. (I.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge."

Sect. 44 is in Part III. of the Act.

Rule 163, "When a composition or scheme is sanctioned, the official receiver shall forthwith put the debtor or (as the case may be) the trustee under the composition or scheme, into possession of the debtor's property. The Court shall also rescind the receiving order."

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delegate the fixing of the time of the discharge to the committee of inspection? How can this be unreasonable if the debtor is willing to assent to it?

[BAGGALLAY, L.J. Does not this provision take away from the Court the determination of the question of the discharge.]

The creditors could resolve that the debtors should have a discharge at once. It in no way interferes with the power given to the Court by sub-s. 6 to consider the conduct of the debtors. And the official receiver has reported that they have done nothing which would disentitle them to a discharge in a bankruptcy. The Act did not intend to take away from the creditors the power which they had in a liquidation by arrangement under the Act of 1869, of saying whether they would retain a control over the debtor's after-acquired property; it was only intended to do away with the abuses which existed in liquidations by arrangement, such as the want of a public examination of the debtor, and the absence of any control over the trustee. If the word "release" had been used instead of "discharge," there could have been no objection to the provision. By r. 163, on the approval of the scheme by the Court the power of the Court is at an end. Some provision must be made by the scheme as to the release of the debtor's property.

[COTTON, L.J. Is there any power to summon a subsequent meeting of creditors at which a majority can bind the minority? I doubt whether the creditors can delegate the power of determining any question as to the property or the discharge of the debtor, so as to bind absent or dissentient creditors.]

The scheme might provide for a future meeting of the creditors to decide as to the discharge; why may they not depute the decision to the committee of inspection? A debtor might have no property, but he might have the expectation of coming into a large property on the death of his father; if the creditors are bound to give him an immediate discharge, property of this nature cannot be made available under a scheme of arrangement. The scope of s. 18 is to leave it as a matter of bargain between the debtor and his creditors on what terms his discharge shall be given. The power of the creditors is unlimited, except by the power given to the Court to withhold its approval; why cannot

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the creditors delegate their power to a proper representative body of creditors? The creditors were unanimous in this case.

[Cotton, L.J. Those who were present at the meeting were; but you want to bind absent creditors.]

The creditors have the benefit of the undertaking of the debtors to assist in the carrying on of the business; they would not have this benefit in a bankruptcy. Is it unreasonable that the business should cease to be carried on when the persons under whose supervision it is to be carried think it ought? The decision in *Ex parte Hope* (1) that creditors could not delegate their power of granting the debtor a discharge, does not now apply, because by s. 125 of the Bankruptcy Act, 1869, an express power was given to the creditors to grant the discharge. The objection to the scheme really amounts only to this, that it enables the future property of the debtors to be made available for the creditors.

Bigham, Q.C., and *Chalmers*, for the official receiver. The intention of the Act was that a debtor should obtain his discharge either in bankruptcy, or by means of a scheme approved by the Court, and that as soon as the scheme was approved it should ipso facto operate as a discharge. It was not intended that the power of the Court as to the discharge should be transferred to an irresponsible body of persons, who should be able to hold a rod over the debtor for the rest of his life. They would be able to say, you shall never have a discharge, and we will have the benefit of your services until we have got 20*s.* in the 'pound, and interest on our debts at some exorbitant rate. This was not the intention of the Act. Sect. 18 intends that the debtor shall be a free man when the scheme or composition has been approved by the Court. The power given to the Court in a bankruptcy to suspend the operation of an order of discharge, or to grant it on conditions with regard to the bankrupt's future earnings or after-acquired property, is a special power which applies only to bankruptcy. Sub-s. 6 of s. 18 contemplates an exercise of the discretion of the Court once for all, at the time when the scheme is before it for approval, whether the debtor is to be a free man or not, and sub-s. 8 shews what the effect of the scheme is to be

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when it is approved; it is equivalent to a discharge in bankruptcy. In either case the Court is to exercise a discretion, but an express discharge is not necessary in either a composition or a scheme of arrangement. If default is made in carrying out the composition or the scheme the Court can, under sub-s. 11, resume its jurisdiction in bankruptcy. The scheme, if it were desired to retain any hold on the future property of the debtor, might provide that a certain part of it (probably it would be unreasonable that the whole should) should pass to a trustee for the creditors. But that is not what is done in the present case. Sect. 44 does not aid the argument of the appellants, for the scheme, when it is approved, puts an end to the proceedings, and there is no property which will vest in the trustee. Sub-s. 6 of s. 18 requires the Court to take into consideration, when it is asked to approve a composition or a scheme, the very same things which it would have to consider on an application for a discharge in a bankruptcy, and this shews that a composition or a scheme by its very nature involves a discharge of the debtor. The present scheme is not a reasonable one; it is not such a scheme as is intended by s. 18. In a bankruptcy, upon payment of the debts in full, the adjudication may be annulled; s. 35. What is to be the position of future creditors who, on the faith of the scheme being accepted, may trust the debtors? Rule 161 provides that the order sanctioning the scheme shall be gazetted. Sect. 44 (2) should in the case of a scheme be read, "all such property . . . . as may be acquired by or devolve on the debtor before the date of the order approving the scheme." If the arguments of the debtors are right a scheme could be forced on an unwilling debtor.

Sidney Woolf, in reply. There can never be a scheme, if the debtor is unwilling. The essence of a scheme is a proposal by the debtor and its acceptance by the creditors. At any rate, the Court would never force a scheme on an unwilling debtor. Sect. 65 would prevent the committee of inspection from insisting on the debtor's paying exorbitant interest on the debts. Why should the official receiver interfere for the protection of the debtors? The debtors are asking that the scheme may be

approved. They do not wish to have their business ruined. It is said that the power of the Court over the discharge of the debtors ought not to be transferred to an irresponsible body; the answer is, that the Court has no such power except in a bankruptcy. Sect. 65 would prevent the committee from saying that the debtors should never have a discharge; they would be entitled to the surplus after payment of the debts in full, with interest as provided by the Act, and costs.

[COTTON, L.J. The carrying on of the business might be unsuccessful, and then the debtors could never get a discharge, unless the committee allowed it.]

If the debtors consent to it, what harm can there be in that? The approval of the Court is required in the interest of the creditors, not in that of the debtor. Under the Act of 1869, the objection frequently raised to resolutions for liquidation by arrangement was that an immediate discharge was given to the debtor. The provision which was intended for the protection of the creditors is now being used for the protection of the debtors. The Act only says that the scheme, when approved, shall be binding on all the creditors; it does not say that the debtor shall be discharged, but only that the remedy of the creditors shall be only under the scheme. The words are the same as those in s. 28 of the Act of 1869, under which the future property of the bankrupt was often made available for his creditors. The Court must either approve of the scheme or not; it cannot impose conditions, as in granting an order of discharge. This shews that the scheme, when approved, has not the same effect as an order of discharge.

BAGGALLAY, L.J. (after stating the facts and referring to the provisions of clauses 5 and 9 of the scheme of arrangement), continued:—

The official receiver, in his report, drew the attention of the Court to the provision of clause 9, which left the granting of the discharge of the debtors entirely in the discretion of the committee of inspection, and submitted that this provision was contrary to the general scope of the Act, and that such a power

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ought not to be conferred on the committee of inspection. Now, s. 18 of the Act contains no reference to any discharge of the debtor in the case of a composition or scheme of arrangement being accepted by the creditors. The provisions as to the discharge in the case of bankruptcy are contained in s. 28, and sub-s. 13 of s. 18 says that part 3 of the Act shall, so far as the nature of the case and the terms of the composition or scheme admit, apply thereto, as if the trustee were a trustee in a bankruptcy, and as if the terms "bankruptcy," "bankrupt," and "order of adjudication," included respectively a composition or scheme of arrangement, a compounding or arranging debtor, and an order approving the composition or scheme. S. 28 is not in part 3 of the Act, but s. 44 is, and it appears to me that sub-s. (i) of s. 44, read by the aid of sub-s. 13 of s. 18, amounts in the case of a scheme of arrangement to this—that the property of the debtor divisible among his creditors shall comprise "all such property as may belong to or be vested in the debtor at the date of the order approving of the scheme, or may be acquired by or devolve on him before his discharge." It appears to me that it contemplates that the discharge may possibly occur at a period subsequent to the commencement of the scheme, and that any property coming to the debtor before that period will be available for distribution among the creditors. That, as it seems to me, is the only way in which the discharge of the debtor was at all in the contemplation of the legislature with reference to s. 18. Then what is the effect of the approval of the scheme by the Court? Sub-s. 8 of s. 18 says that the scheme accepted and approved "shall be binding on all the creditors so far as relates to any debts due to them from the debtor, and provable in bankruptcy." and that is extended by rule 163, which says that "when a composition or scheme is sanctioned, the official receiver shall forthwith put the debtor (or, as the case may be, the trustee under the composition or scheme) into possession of the debtor's property. The Court shall also rescind the receiving order." Therefore, as it seems to me, the proceedings in bankruptcy come to an end when once the Court has approved of the scheme, and this, of course, ought to be taken into consideration before the approval

of the Court is given. Sub-s. 10 of s. 18 provides for the enforcing of a composition or scheme by the Court; but, except for that, the bankruptcy proceedings are at an end, and the receiving order is to be discharged. It is, therefore, very important that the Court should see what is the precise nature of the scheme before it gives its approval. In the present case, as I understand it, no objection is taken to the provisions of the scheme, except with regard to the power which is given to the committee of inspection over the release or discharge of the debtors. I am not now prepared to say what would be the effect of a scheme of arrangement if it contained no provision as to the time when a discharge should be given to the debtor. Speaking offhand, I am disposed to think that the approval of the scheme by the Court would be equivalent to the discharge of the debtor. It is not necessary that I should express any opinion what the result would be if some fixed time was appointed for the discharge of the debtor, or if it was made to depend on some act to be done by the debtor himself when he should obtain his discharge. My present opinion is that the Court would not consider such a provision unreasonable. But here the granting of the discharge is simply left in the discretion of the committee of inspection. It appears to me that this is a provision of an unreasonable character, and I think the registrar was right in deciding that the delegation of such a power to the committee of inspection ought not to be sanctioned by the Court. On this ground, therefore, I am of opinion that the appeal ought to be dismissed.

COTTON, L.J. I am of the same opinion.

The question is whether the scheme is a reasonable one, and I am of opinion that no scheme would be reasonable which was not such as was contemplated by the Act; or which was contrary to the intention of the legislature as expressed in the Act, though there might, of course, be other grounds for holding that a scheme was unreasonable. The objection to the scheme in the present case is that the discharge of the debtor is left in the discretion of the committee of inspection. It is said that this is merely a provision for giving the after-acquired property of the debtors to the

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creditors. That, however, is not what is objected to. I am of opinion that a provision that the debtor should assign his after-acquired property to a trustee for the benefit of his creditors would be unobjectionable. It is not necessary to express any opinion whether a clause providing for the discharge of the debtor, either at a fixed time, or upon the happening of some event depending on some act of the debtor himself would be reasonable. But sub-s. 6 of s. 18 provides that, in determining whether it shall approve a scheme of arrangement, the Court is to take into consideration those matters which are mentioned in s. 28, and which it has to consider upon the hearing of an application for the discharge of a bankrupt. The Court is to take the same matters into consideration upon an application for the approval of a scheme of arrangement and upon an application for a discharge in a bankruptcy. It is not that the order approving the scheme is of itself necessarily equivalent to an order of discharge, but the Court is to have in its hands the control of the question whether the debtor is a person who ought to have a discharge. Under this scheme it is quite possible that, without any fault of the debtors, they may never get a discharge at all. It is made to depend, not on the discretion of the Court, but on that of persons to whom the Act has given no such discretion. I am of opinion that this is not such a scheme as is contemplated by s. 18. That section, I think, contemplates that the creditors shall give the debtor his discharge, either immediately, or at some defined time, subject, of course, to the approval of the Court. That, in my opinion, is the meaning of s. 18. If the creditors think that such a scheme ought to be coupled with some provision for making the debtor's after-acquired property available for distribution among them, in my opinion they can do so. But it is not, in my opinion, within the purview of s. 18 that there should be no provision for the discharge of the debtor, but that the decision should be delegated to other parties, so that it is quite possible that the debtor may never have a discharge at all. I think this is not such a scheme as is contemplated by s. 18, the intention of which, in my opinion, was that the creditors themselves at the meeting should decide as to the discharge of the debtor.

LINDLEY, L.J. I am of the same opinion. The case is one of importance, it is a test case. Before the Court approves of a scheme of arrangement, it must see what the scheme is, and understand how it will work, for the scheme, if approved, will bind all the creditors. One of the provisions of this scheme is that the debtors are not to be discharged until the committee of inspection shall think fit. What is the effect of that? I am very much perplexed by it. The scheme hands over to the committee of inspection the determination of the time at which the debtors shall be discharged. So long as the discharge is in suspense the position both of the debtors and of the creditors is uncertain and embarrassing. It appears to me that this is not consistent with the general scheme of the Act. It is said that the only effect is to hand over the debtors' after-acquired property to the creditors. I think that might be done much better in another way. To my mind the provision is very embarrassing, and it is opposed to the general scope of s. 18.

Appeal dismissed.

The official receiver not objecting, it was ordered that all the costs should be paid out of the assets.

Solicitors for debtors: *Gush, Phillips, & Walters.*
Solicitor for official receiver: *W. W. Aldridge.*

W. L. C.

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June 18.

EX PARTE ROGERS. IN RE ROGERS.

Bankruptcy—Bankruptcy Petition—Composition—Reasonableness—Rash and hazardous Speculation—Retrospective Effect of Act—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 28, *sub-s.* 3 (*d*).

In determining whether a composition accepted by creditors under the provisions of s. 18 is reasonable, the Court must exercise its own judgment, though it will take into account the fact that the creditors are mainly interested in the question.

The Court must have regard to the debtor's assets and liabilities, and if, for a large proportion of the debts set down in his statement of affairs proofs have not been tendered, or if the Court considers that the proofs which have been tendered require to be investigated by a trustee, the Court ought to decline to approve of the composition.

The Court of Appeal will not overrule the exercise of the discretion of the judge of first instance as to the approval of a composition, unless it is clearly satisfied that he was wrong.

The quasi penal provisions of sub-ss. 2 and 3 of s. 28 are retrospective, i.e., they apply to acts done by the debtor before the Act came into operation, if the proceedings are instituted under that Act.

A trader, after he knew that one of his debtors who owed him about 32,000*l.* was in pecuniary difficulties, allowed him, in the course of eighteen months, to increase his debt to 65,000*l.*, and to the extent of 11,000*l.* this increase was due to accommodation bills. The trader then stopped payment, and presented a bankruptcy petition. The debt of 65,000*l.* was apparently irrecoverable:—

Held, that the debtor had been guilty of rash and hazardous speculations, and that on this ground (inter alia) the Court ought to refuse to approve of a composition which his creditors had, under the provisions of s. 18, agreed to accept.

APPEAL from the refusal of the Judge of the Liverpool County Court to approve of a composition which had been accepted by the proper statutory majority of the creditors of J. F. Rogers, as provided by s. 18 of the Bankruptcy Act, 1883.

The debtor was a fruit broker in Liverpool, and he carried on business under the firm of Dart & Rogers. The business was commenced by him in September, 1867, in partnership with W. F. Dart. Dart retired on the 30th of December, 1882. The business was continued by Rogers, who took over the liabilities of the firm. By the terms of the deed of dissolution, Dart was

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to receive 7000*l.* On the 7th of January, 1884, the debtor suspended payment, and placed his books in the hands of Messrs. Harmood Banner & Son, accountants, of Liverpool. They, on the 9th of January, sent a circular to the creditors informing them of the stoppage, and of the fact that the books had been placed in their hands for investigation. On the 1st of March, 1884, the debtor presented a bankruptcy petition in the Liverpool County Court, and a receiving order was at once made. In the interval between the 7th of January and the 1st of March, Messrs. Banner & Son had received various sums by the sale of produce which had been consigned to the debtor for sale, and had, out of the moneys thus received, paid various sums to merchants who claimed to be entitled to some of the produce thus sold. The public examination of the debtor was held on the 10th of March, 1884, and was continued by adjournment on the 24th of March, the 7th of April, and the 24th of April, when it was closed.

The first meeting of the creditors was held on the 31st of March. No meeting of the creditors had been previously summoned by the debtor. The debtor's statement of affairs shewed that his liabilities amounted to 92,118*l.* and his assets to 14,532*l.* At this meeting the debtor submitted a proposal for a composition of 3*s.* 6*d.* in the pound. The meeting was adjourned to the 22nd of April, and a committee, consisting of four of the principal creditors, was appointed to consider a report which had been made by the receiver, and to investigate the debtor's affairs. At the adjourned meeting the committee stated, as the result of their investigation, that they considered it desirable to accept the composition offered, and a resolution to accept it was carried. The proofs then admitted for voting purposes amounted to 59,500*l.* 11*s.* 11*d.* Of these, creditors to the amount of 48,166*l.* 16*s.* 11*d.* were present and admitted to vote, and of these, creditors to the amount of 43,153*l.* 19*s.* 1*d.* voted in favour of the proposal, and 3000*l.* against it. The remainder, amounting to 2012*l.* 17*s.* 10*d.*, did not vote at all. The second meeting was held on the 12th of May, 1884. The proofs and voting were then as follows:—

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	£	s.	d.
Proofs lodged 80, amounting to . . .	75,533	12	8
„ admitted for voting purposes (72)	66,844	13	0
„ assenting to the proposal (62) .	62,134	13	7
„ dissenting	none		
„ not voting at all (9)	4,709	19	5
„ not admitted for voting purposes	8,688	19	8

The resolutions passed provided that a composition of 3*s.* 6*d.* in the pound should be accepted in satisfaction of the debts, of which 2*s.* was to be paid in cash within ten days from the approval of the resolutions by the Court, and the remainder in three instalments of 6*d.* each, respectively within six, twelve, and twenty-four calendar months after the same date. It was also provided (3) "that all debts owing by the debtor which are entitled to priority or preference, if the estate were distributed in bankruptcy, and the costs of the proceedings in this Court, shall be paid in full before the payment of the composition, or any part thereof, and shall be paid out of the first moneys which shall come to the hands of the trustee herein"; (4) that the payment of the composition and of the preferential debts and costs should be secured by an assignment to Mr. Banner of the property in the hands of the official receiver, and other specified property, and by promissory notes of the debtor for the second, third, and fourth instalments of the composition; (5) that Mr. Banner should be appointed trustee for the receipt and distribution of the composition; (6) that upon the approval by the Court of the resolutions, and upon the security for the payment of the composition, &c., being given to the satisfaction of Mr. Banner, as provided by the 4th resolution, the receiving order should be rescinded; (7) that the debtor should assign to Mr. Banner all moneys then due and owing to him from Peter Anino, of Patras, A. G. Graham, of Denia, Spain, and Chiefalino & Co., of Liverpool, upon trust to receive the same and distribute the moneys so received rateably amongst the creditors. Such moneys (if any) to be in addition to and not in substitution for the composition.

The debtor applied to the county court for its approval of the

composition. The official receiver made a report to the Court, dated the 21st of May, 1884, of which the material part was as follows:—

"With regard to the proposal itself, the estate has been involved in so many questions of doubt and uncertainty that it is very difficult indeed for me to say, with any degree of accuracy, whether the proposal is fair and reasonable, or whether it may be for the best advantage of the creditors or not.

"The composition is based on the assumption that proofs will ultimately rank upon the estate for about 90,000*l.* Anything falling short of this must be a clear profit to the debtor on the amount of the proofs alone. At present there are only proofs to the amount of 75,950*l.*

"It is assumed, too, that every one of these proofs, including that of the debtor's late partner for 6595*l.* 4*s.* 2*d.*, are good proofs, upon the debtor's own statement, and without such an investigation as would take place by a trustee and committee of inspection.

"Between the date of suspension, the 7th of January, 1884, and the date of filing the petition on the 1st of March, 1884, the debtor disposed of his business and its connection to Mr. Coulbrough at the price of the office fixtures. The new firm is now 'Rogers, Coulbrough, & Co.' As the debtor will probably join this firm when discharged, and take the benefit of anything which may arise through this sale, it becomes a question whether he ought not to pay the creditors something for the connection beyond the mere price of the fixtures.

"Between the above dates also various sums of money came to the hands of the debtor, or his accountants, amounting in all to 28,032*l.* 1*s.* 9*d.*

"Of this money a balance only of 14,811*l.* 11*s.* 5*d.* has been handed to the official receiver; the remainder, or 13,220*l.* 10*s.* 4*d.*, having been paid away to various persons.

"These payments cover several pages of the cash-book, and are involved in questions of law and custom of the trade, apart from any question that may arise in giving one creditor a preference over the others.

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"Of the balance in my hands 7000*l.* is claimed by various persons, but this money is also similarly involved.

"These and other matters were brought out at the public examination, the notes of which are on the file.

"With regard to the conduct of the debtor, it is my duty to call the attention of this Honourable Court to the irregular proceedings which occurred directly after the suspension, in dealing with and disposing of the property, and large sums of money in connection with the estate, without the proper authority of the creditors, or the intervention or supervision of this Honourable Court.

"The only other point I have to report is the question of reckless trading.

"The net loss to the creditors, as shewn in the statement of affairs, is 74,244*l.* 0*s.* 11*d.*; this money has been lost by bad debts, three of these debts alone amounting to the sum of 81,692*l.* 17*s.* 10*d.*, viz., P. Anino of Patras, 65,000*l.*; A. G. Graham of Denia, Spain, 9800*l.*; and Chiefalino & Co. of Liverpool, 6892*l.* 17*s.* 10*d.*

"The first credit allowed P. Anino was the sum of 2000*l.* in 1878. On the 30th of June, 1882, the debit balance had increased to 31,754*l.* 2*s.* 5*d.*, after deducting all goods and drafts in hand. On the 30th of June, 1883, the indebtedness had further increased to 47,000*l.*, and on the 1st of March, 1884, to 65,000*l.*

"On the debtor's own admission at his public examination these excessive credits were 'unusual' and 'imprudent.'

"The debtor's books appear to have been well kept and regularly balanced.

"I have no evidence that the debtor has committed a misdemeanor under the Debtors Act, 1869, or any amendment thereof, or under this Act."

Among the debts included in the statement of affairs was a sum of 6595*l.* 1*s.*, which was alleged to be remaining due to Dart, the debtor's late partner, in respect of the 7000*l.* which he was to receive under the provisions of the deed of dissolution.

In the course of the debtor's examination he admitted that there was an understanding between himself and Coulbrough that, if the debtor should succeed in settling with his creditors on a

fair basis, he should have a share in the business thereafter. He explained that what was a fair basis was a question open to Coulbrough to consider, and that he expected that Coulbrough would offer him a partnership with a half share of the profits. The average profits of the business had been about 6000*l.* per annum.

With regard to the debt due from Anino, it appeared that it consisted mainly of advances made by the debtor upon produce to be consigned to him, but the increase of that debt from about 32,000*l.* to 65,000*l.*, between June, 1882, and the stoppage, arose, to the extent of 11,000*l.*, out of bills accepted by the debtor for Anino's accommodation in exchange for other bills which had proved worthless. There had been a heavy fall in the market price of fruit in the year 1883. On the 21st of November, 1882, the debtor had written a letter to Anino as to the debt then due from him. In this letter he said (inter alia), "As we have previously told you it is absolutely necessary for you to send us a further consignment, or to keep us in funds to meet your bills as they fall due. Not only is it inconvenient, but it is impossible for us to meet these large amounts, unless you provide for them. We require 5000*l.* to meet bills falling due this month, and 17,000*l.* to meet bills falling due in December. We are surprised that you cannot at once remit 500*l.* to pay Cremide's bill. You think nothing of drawing thousands upon us without our consent, and yet cannot, when we require it, remit a paltry sum like this."

On the 13th of December Anino replied thus:—"The downward tendency of your markets in our trade, added to the general distrust, all these reasons closed my hands and the money, and must look partially for a revival of our trade on your side, which will develop our credit here. I will leave the result to reimburse you the money have overdrawn, as in the present without sales cannot say positively and point out the day will remit you, am in hopes that very soon we will see the rise to enable me to fulfil my engagements."

It appeared that the assets shewn by the statement of affairs were insufficient by about 4000*l.* to pay the composition on the estimated amount of debts, after allowing for fees and other

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charges which would have to be paid, and for some other possible claims.

Both the debtor and Mr. Banner gave evidence to the effect that the whole of the 92,118*l.* would in all probability be proved against the estate.

The judge of the county court refused to approve of the composition, on the ground that it was unreasonable and not calculated to benefit the creditors. His Honour's principal reasons for coming to this conclusion were that the payments made during the interval between the stoppage and the presentation of the petition ought to be inquired into; that it was possible that large sums out of the estimated liabilities might not be proved as debts, if they were strictly inquired into by a trustee; and he thought that a trustee should be appointed, and the proofs gone into, and accepted or rejected, and that the sale of the business to Coulbrough ought also to be inquired into, in order to ascertain whether anything could be obtained for the creditors from the goodwill. His Honour was also of opinion that the debtor had, in his transactions with Anino, been guilty of "rash and hazardous speculations," within the meaning of s. 28, sub-s. 3 (*d*).

The debtor appealed.

Mulholland, for the debtor. The debtor's affairs were fully inquired into at the public examination, and nothing can be gained by any further investigation. It is not suggested that any of the alleged debts are manufactured. A large number of proofs have already come in, and the evidence shews that other debts are represented by bills outstanding in the hands of bankers and others. There can be no doubt that these will be proved. It is the necessary result of a scheme of arrangement or a composition that there will not be so complete investigation into the affairs of the debtor as there would be under a bankruptcy with a trustee and committee of inspection. As to the money which was paid away in the interval between the act of bankruptcy and the petition, the evidence shews that it was paid to merchants who had a lien on the produce which they had consigned to the debtor as a broker for sale. He stood in the position of a trustee

for them. The official receiver does not report that the debtor has been guilty of any of the offences mentioned in s. 28, and the judge finds that he did not continue to trade after he knew that he was insolvent. He may have continued his trading longer than he should, but that does not amount to "rash and hazardous speculations." The advances which he made to Anino were in the ordinary course of business in the trade. The failure is due to the fact that there was a great fall in the value of produce. When a trader is carrying on his business in the ordinary course, he is not bound to file a bankruptcy petition immediately he has any suspicion of insolvency, if he has a reasonable hope of recovery: *Ex parte Fryer*. (1) The provisions of s. 28 are not retrospective, i.e., they do not apply to acts done before the Act came into operation; or, if they do, they should be interpreted leniently in the case of a debtor who was, before the Act came into operation, trading in the ordinary course of his business. The Court has a discretion. An Act is never held to be retrospective, unless it is made so either expressly or by necessary implication.

[CAVE, J. Sect. 170 is clearly retrospective in the sense to which you refer.]

That rather tends to shew that the rest of the Act is not. It was intended to start with a new Code on the 1st of January, 1884. Under s. 170 the Court would not take into consideration the penal clauses of s. 28. The creditors are practically unanimous in approving the composition, and they have fully investigated the matter. Moreover, in order to pay the composition, the debtor will have to obtain from his friends 3000*l.* or 4000*l.* more than the value of the assets. This is a clear gain to the creditors.

Chalmers, for the official receiver, did not oppose the composition.

MATHEW, J. I am of opinion that the judgment of the county court judge must be upheld. This case illustrates very clearly the difference between the old bankruptcy procedure and the new, and, I venture to say, it shews greatly the advantage of the new practice over the old.

(1) 10 L. T. (N.S.) 197.

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The question before the county court judge was, whether a composition, accepted by the requisite majority in value and number of the creditors, was to be binding on all the creditors. In order to determine that question it is necessary for the Court to say whether the composition offered is fair and reasonable; and, secondly, to decide whether there has been anything in the conduct of the debtor, within the meaning of s. 28 of the Act, to prevent the Court from expressing its approval of the composition.

The two questions must be dealt with independently. I agree with Mr. Mulholland that, with reference to the first question, it must be borne in mind that it mainly concerns the creditors whether the composition is fair and reasonable, and that it is a question less affecting public interests than the other, in which the Court intervenes with a view to uphold the credit of the mercantile community at large, and the regularity of mercantile transactions.

Now, the first thing to enable the Court to form a judgment whether the composition offered was fair and reasonable is, to ascertain what was the real position of the estate at the time when the act of bankruptcy was committed on the 7th of January, when the circular announcing the insolvency of the firm was sent round to the creditors. The first point to which the official receiver properly directed the attention of the Court was the dealing with the estate in the interval between the 7th of January and the 1st of March. It was the duty of the Court to inform itself what was the real position of the estate. It is said that the Court has been relieved of that obligation, if, somehow or other, a result has been arrived at, in a rough and ready way with which the creditors, or the majority of them, are content when the matter is submitted to them. The rough and ready method adopted in the present case was this. The bankrupt was a fruit broker, and in that capacity he received consignments of fruit from merchants, who drew upon him in the ordinary way in respect of the consignments. Some of those consignments had come to hand, and were in process of realisation at the date when the circular was sent out. Moneys were received subsequently, and, instead of the superintendence and supervision contem-

plated by the Act under such circumstances, the matter was intrusted to Mr. Banner, a member of a firm of accountants, who is, no doubt a gentlemen of respectability and high position. He was directed to conduct an irregular process of liquidation. I dare say he did his best, but he was endeavouring to accommodate conflicting claims and interests, the claims of creditors in respect of the consignments, and the claims of the other creditors of the firm. We are told that considerable difficulties presented themselves, but, that ultimately, by the help of advice from different quarters, and the aid of the opinion of counsel, which we have not seen, the irregular committee, who were to supervise what Mr. Banner was doing, were content, and so reported to the creditors.

Now, this matter having been brought before the learned judge, whose duty it was to say whether the composition was fair and reasonable, he tells us that he is not satisfied that this dealing with a portion of the debtor's estate was a proper mode of dealing with it. That is the first ground on which he has refused to sanction the composition. It is said that he ought to have been satisfied. It is extremely difficult to put us in the position of the judge of the Court below. He did not think that he ought to accept the judgment of this irregular committee in substitution for his own opinion. Speaking for myself, I think he was very wise in that conclusion, and, even if I was less clear about it than I am, I should hesitate very long before I interfered with his conclusion. In bankruptcy cases particularly, confidence ought to be reposed in the judgment of the judge before whom the proceedings are conducted. He has an opportunity of seeing the parties, and is far better able to judge of the case than anyone else.

On that point, therefore, I agree with the learned judge in his conclusion.

The second point was, that though proofs had been admitted to a very large amount, over 66,000*l.*, and the debts of the assenting creditors amounted to 62,000*l.*, a very large balance was apparently not represented, except by the opinion of the majority. Proofs to a considerable amount had not come in at the time the matter was before the judge; a large margin still remained outstanding. Having regard to the character of the composition,

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the amount of it, and the mode in which it was to be paid, the judge thought that he ought to be satisfied that the whole of the alleged debts were real debts, because, if the debts were less than the alleged amount, if to any extent they did not represent genuine transactions, the fund for the payment of the composition would be created out of that margin.

The learned judge was not satisfied as to this, and I can see no reason to differ from his conclusion.

We were pressed by Mr. Mulholland with this, that the composition offered was beyond the amount of the assets; and that a sum of 3000*l.* or 4000*l.* must be obtained elsewhere for its payment. It became extremely important under these circumstances to see whether there was any such margin as was suggested. It became equally important to look at another transaction, the sale of the business. It was a business of a peculiar kind, carried on for a long time with apparently a very small capital, 2000*l.*, and it appeared that it had been disposed of, and nothing had been realised by the sale. It may be said "what good is to be got out of a bankrupt's business; who is likely to pay a farthing for it?" That may be a judicious observation, but it turned out that an arrangement had been come to under which the debtor was to enter the business again and become a partner in the new firm. The judge thought that under these circumstances there ought to be an investigation, whether this business (capable, it is said, of yielding 6000*l.* a year) was not the same business which was to be carried on by the debtor again, and whether it might not be expected to yield a larger sum in the course of the two years during which the composition is to be paid than the 6*d.* in the pound which the debtor had agreed to pay.

There, again, the discretion of the learned judge was soundly exercised with reference to the question whether the composition was fair and reasonable, and I do not differ from his conclusion.

There remains the question, as to the character of the business which this trader was carrying on, whether his failure was brought about by rash and hazardous speculations. I should have thought that it was only necessary to quote the figures in order to come to the conclusion that the trading must have

been rash and hazardous, and that the bankruptcy was due to rash and hazardous speculation. In the year 1882, Anino owed the debtor about 32,000*l.* In the course of one year, between 1882 and the early part of 1884, when the firm stopped payment, the debt had been swollen from 32,000*l.* to 65,000*l.* It is possible, no doubt, that there might have been an explanation how that happened, without there being rash and hazardous speculation on the part of the debtor. But the learned judge was not without information on this subject. He had before him the letter written as late as the 21st of November, 1882, by the debtor to Anino, at a time when the debt was about 32,000*l.*, and in that letter the greatest possible pressure was put by the debtor upon Anino to induce him to make some payment on account. All that we know is that Anino subsequently came to this country, and by some representations which he made the debtor was induced to permit his debt to be increased from 32,000*l.* to 65,000*l.* Really, all that Anino could put his finger on as the fund from which this old debt was to be paid, was a probable rise in the market here, and for the sake of this possible rise in the market he was kept going for another year. In the hope that a rise in the market would enable the debt to be paid, a further debt of nearly the same amount was contracted. I cannot differ from the conclusion of the learned judge that this was a rash and hazardous speculation within the meaning of the Act. I agree, therefore, that this composition ought not to be sanctioned by the Court.

CAVE, J. I am of the same opinion. According to s. 18, the judge of the county court had to be satisfied that the terms of the composition were reasonable, and calculated to benefit the general body of the creditors, and it necessarily follows that it is not sufficient that the creditors themselves have come to that conclusion, although no doubt that is an element which the Court may, and ought to, take into account. But it is for those who propound the scheme, and who have to obtain the approval of the judge, to satisfy him that it is reasonable, and calculated to benefit the general body of the creditors. In order to shew that the scheme is reasonable, it is necessary to ascertain two points

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at least. First, what may be expected to be the assets of the debtor, and secondly, who are the creditors who will have to share those assets amongst them. Both these points were inquired into by the learned judge.

Now, undoubtedly, there had been some irregular dealings. After his suspension of payment on the 7th of January, the debtor thought fit to carry on his business through the agency of Mr. Banner, who received and paid away moneys belonging to the estate, and between the 7th of January and the 1st of March he had paid away over 13,000*l.* It is obvious that, if that sum was not properly paid away, the composition offered was not a proper composition, and not one which ought to bind the creditors. The judge entered into that question, and he was not satisfied that those payments had been properly made. If he was not satisfied of this, it was impossible that he could approve of the composition as being reasonable.

Was he then wrong in that conclusion? He had a discretion to exercise, and before we overrule the exercise of his discretion, we ought to be satisfied that he was wrong. But, if we come to a clear opinion that he was wrong, we ought not, I think, to hesitate to overrule him.

It is said that, although the learned judge was not satisfied that these payments were properly made, the creditors were satisfied, and that they are the persons who have the real interest in the matter. Let us see for a moment what was done by the creditors, and how their satisfaction was obtained. In the first place it is alleged that there are creditors to the amount of 92,000*l.*, or thereabouts, and at the first meeting, when the proposal was submitted, creditors to the amount of 43,000*l.* voted in favour of it. At the second meeting, when it was confirmed, creditors to the amount of 62,000*l.* voted in favour of it. Creditors to the amount of 4700*l.* did not vote, and proofs to the amount of 8600*l.* were not admitted to vote. There were said to be creditors to about 17,000*l.* more who had not proved. The result, therefore, is that the scheme has been approved of, not by the whole of the alleged creditors, but by two thirds only. I mean that only two-thirds have actually approved of it; the others have either not expressed their views at all, or have not put themselves in a position

to express their views by properly proving their debts. That shews how necessary it is that a discretion of this kind should be vested in the judge. We are told that the creditors are unanimous in accepting the composition. But it turns out, when you come to analyse the matter, that though two-thirds of them have expressed their approval, the others have not expressed any opinion at all. They are in a negative position.

Again, let us see how this approval was arrived at. A committee appears to have been appointed, somewhat informally, consisting of four of the principal creditors, one of whom was examined before the learned judge. These are the persons who really went into the matter, so far as it was gone into at all. The remainder of the creditors appear to have been satisfied with the inquiries which these gentlemen made. One of them, who was examined, was asked whether he went into the figures put before him by Mr. Banner as representing the amount which would be divisible among the creditors, and he said that they did not go into the figures in detail, but were satisfied in general that that was the amount. Now what does that mean but that they accepted Mr. Banner's assurance? and when you inquire what the acceptance and approval of the creditors really means, it is this: that four of the principal creditors, who did not go into the figures in detail, thought generally that the figures put before them by Mr. Banner were right, and the remainder of the creditors were satisfied to follow in their wake.

Therefore, with regard to the assets, the learned judge, in my opinion, very reasonably declined to be satisfied that the sum alleged to be available as assets was the real sum, when there was nothing for it except Mr. Banner's statement, and the fact that four creditors, who had not gone into the figures in detail, had in general adopted his view, and that two-thirds of the creditors had been content to accept what they had done in the matter.

Then there was another question, viz., who were the creditors who were to share in the assets? That again is very material for the purpose of deciding whether the sum offered is a reasonable and proper sum. Now the proofs which had been tendered amounted to 75,000*l.*; 17,000*l.* worth of the alleged debts had never been offered for proof, and the 75,000*l.* had not been

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subjected to any searching inquiry for the purpose of ascertaining whether the proofs were well founded or not. The debtor asserted that they were debts which he owed; the creditors asserted that the debts were owing to them; but there had been nothing in the nature of an independent inquiry.

The learned judge, under these circumstances, was not satisfied that the debts did amount to 92,000*l.*, and I certainly am not prepared to differ from him, because, so far as I can judge, there had been no investigation of these proofs by anyone.

I think that these points are very strong to shew that the composition is not a reasonable one. But there is another point. The debtor had been engaged in a business of apparently a lucrative character. He estimated his profits at 6000*l.* a year, and, if the business was conducted in a legitimate way, it could be carried on with a small capital. He began with a capital of about 2000*l.*, and, although his capital had risen considerably, assuming the debt of Anino to be a good debt, yet, inasmuch as Anino owed the money, the amount of actual capital in the concern seems to have been less than nothing; and, notwithstanding that, a business worth 6000*l.* a year was carried on.

It turns out that the debtor has sold this business, and that he has made an arrangement with the purchaser by which, if this composition should pass, he would at once step back into the business—a business apparently producing 6000*l.* a year without capital, and for that the creditors are to receive absolutely nothing. He is to get rid of his debts of 92,000*l.*, and the next day step back into this business bringing in 6000*l.* a year.

Then there is the question whether the debtor has been guilty of rash and hazardous speculation. He had allowed Anino to contract a debt which had mounted up in a comparatively short space of time to 32,000*l.* In December, 1882, it amounted to 35,000*l.*, and, although the debtor must have known, as appears by his letter of November, 1882, that Anino's position was most unsatisfactory, yet, nevertheless, not only did he not reduce that debt in the following year, but allowed it to be doubled. Now, how was that done? Mr. Mulholland, who has argued the case extremely well, and has said everything that could possibly be said on behalf of his client, says that he made advances by

accepting bills for which Anino undertook to send forward produce. Anino, it appears, did not send forward produce, or sent it forward to a less extent than the bills he had actually drawn. The consequence was that the debt ran up from 32,000*l.* to 65,000*l.* in little more than a year. But when the matter is looked into it appears that Anino was not only drawing upon produce to be forwarded, but was drawing purely accommodation bills upon the debtor. The debtor admits that Anino drew upon him, and sent him, not produce, but other bills, in exchange, and consequently he was, under the guise of accepting bills against future produce, really accepting bills against bills which Anino sent him. He was engaged, consequently, in endeavouring to keep Anino afloat, not in the legitimate way of acting as broker for him, but by accepting accommodation bills for him.

Looking, as we must, at all the circumstances together, in my judgment the learned judge would not properly have discharged the duty which he owed to those creditors who had not accepted the resolutions, if he had come to the conclusion that the terms of this composition were reasonable, and calculated to benefit the general body of the creditors.

I should have hesitated to overrule his decision, even if I had entertained some doubt whether his conclusion was right, because I think that s. 18 gives a discretion to the judge which ought not lightly to be interfered with by the Court of Appeal, which has not the same opportunity of coming to a correct conclusion as the Court below. But, in the present case, so far from hesitating whether the judge was right or wrong, I think that he has exercised his discretion rightly, and, if I had been in his place, I should have come to the same conclusion.

Day, J. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for debtor: *Whitley, Maddock, & Co., Liverpool.*
Solicitor for official receiver: *Solicitor to Board of Trade.*

W. L. C.

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June 19.

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Bankruptcy—Landlord and Tenant—Forfeiture on Tenant "being Bankrupt"—Bankruptcy Petition under Bankruptcy Act, 1883—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 149—*Fixtures—Notice of Breach by Landlord—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

A lease (executed in 1880) of a mill and warehouse, for twenty-one years, contained a covenant by the lessors with the lessees (inter alia): (4) that certain articles mentioned in a schedule should be the property of the lessees, and should be removable by them, they making good all damage done by such removal. The articles mentioned in the schedule were iron columns, beams, floors, brick piers, and things ejusdem generis. There was a proviso (1) that in case (inter alia) the lessees should during the term be bankrupts, or file a petition in liquidation, the term should cease; (2) that the lessees might by notice determine the term at the end of seven or fourteen years; (3) that on the determination or cesser of the term all the machinery, and also all the buildings erected by the lessees (other than certain specified buildings) should be their property, and should be removed by them previously to the determination or cesser of the term, unless it should be then mutually agreed that the lessors should purchase them, the lessees, in case of removal, to make good all damages which might be caused by such removal. After the Bankruptcy Act, 1883, came into operation, the lessees presented a bankruptcy petition, and a receiving order was made:—

Held, first, that the presentation of the petition caused a forfeiture of the term; secondly, that notwithstanding the forfeiture, the official receiver was entitled to the articles mentioned in clause (4) of the covenant and clause (3) of the proviso as being property of the lessees.

Quære, whether the receiver was entitled to enter and remove the articles, or whether he could only call on the lessors to deliver them to him.

Held, further, that s. 14 of the Conveyancing Act, 1881, had no application.

APPEAL from the County Court of Norfolk, holden at King's Lynn.

By lease dated the 1st of October, 1880, the King's Lynn Dock Company demised to William Walker and Edward William Walker (who carried on the business of seed crushers in partnership, under the firm of William Walker & Son), their executors, administrators, and assigns, some pieces of land, a machinery room or mill, and a warehouse, situate at King's Lynn, and also the exclusive use of quay room for one vessel in front of the warehouse, for the term of twenty-one years from the 1st of January, 1877,

determinable as in the lease mentioned, at the annual rents therein reserved, and subject to the covenants therein contained. The company thereby covenanted with the lessees (inter alia) "(4.) That the several articles and things mentioned in the schedule hereto shall be the property of the lessees, and shall be removable by them, the lessees making good all damage done by such removal." This covenant was followed by a proviso: "(1.) That in case the said rent shall be in arrear for twenty-one days, or the said lessees shall during the said term be bankrupts, or file a petition in liquidation, or make an assignment for the benefit of their creditors, then the said term hereby created shall cease." "(2.) That in case the lessees shall be desirous to determine the said term at the end of the seventh or fourteenth years thereof, and shall give to the company six calendar months notice in writing of such desire expiring at the end of the said seventh or fourteenth year thereof, then the said term shall cease." "(3.) That on the determination or cesser of the said term, the machinery room, warehouse, and chimney shall be and remain the property of the company, but all the machinery, and also all the other buildings erected by the lessees shall be their property, and shall be removed by them previously to the determination or cesser of the said term, unless it shall be then mutually agreed by the said company and lessees that the company shall purchase them, the said lessees, in case the same shall be removed, to make good all damage which may be caused by such removal."

The schedule enumerated the following articles: "Iron columns and beams in boiler-room; wood floor in oil-mill; tooled York floor in oil-mill, engine-room, and boiler-house; Bramley fall stones to columns; brick piers under machinery columns; eleven beams for supporting machinery; plate hoppers in warehouse for feeding mill-stones."

In March, 1884, the lessees presented a bankruptcy petition to the Lynn County Court, and on the 13th of March a receiving order was made, under which the receiver entered into possession of the demised premises, and the fixtures, machinery, and other articles therein. On the 25th of March, during the absence of the workmen, the dock company (the lessors) padlocked the doors,

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and on the 5th of April they placed a man in possession. On the 10th of April the official receiver gave notice to the company of his intention to apply to the Court for an order directing them to deliver up possession to him of the demised premises, and of all the machinery, goods, and chattels therein. There was no rent in arrear, and the debtors had not been adjudicated bankrupts. The judge was of opinion that a forfeiture of the lease had accrued, and that the lessors were rightly in possession, but he dismissed the application on the preliminary objection that under s. 102, sub-s. 1 of the Bankruptcy Act, 1883, the Court was precluded from exercising jurisdiction, because, though the question arose in a case of bankruptcy, the claim did not arise out of the bankruptcy, but might have been enforced by action in the High Court, and the money's worth in dispute exceeded in value £200, and the company did not consent to the exercise of jurisdiction.

The receiver appealed.

Winslow, Q.C., and *Yate Lee*, for the appellant. As to the question of jurisdiction, when the official receiver took possession the property belonged to the debtors; there could be no forfeiture until the lessors chose to exercise their right to forfeit. But no one, even if he has a paramount title, can be allowed to oust the receiver, who is an officer of the Court; the permission of the Court must first be obtained.

Arthur Charles, Q.C., and *Horace Browne*, for the lessors. The property was vacant when the company took possession, and the receiver then claimed possession again. The county court had no jurisdiction, without the consent of all parties, to try the case, the claim not arising out of a bankruptcy, but being one which might have been enforced by action in the High Court, and the money's worth in dispute exceeding 200*l.*: Bankruptcy Act, 1883, s. 102.

[CAVE, J. If the lessors have interfered with the possession of the receiver they have committed a contempt of Court, and that gives the Court jurisdiction.]

There is no allegation or proof of a contempt.

[CAVE, J. On the evidence I think it is clear that the lessors turned the receiver out of possession, and the application is made

to reinstate him. Either they submitted to the jurisdiction, and then they are entitled to uphold the order if it is right; or if they did not submit, and there was no jurisdiction to decide the question of right, at any rate the judge was entitled to order them to give up possession until the question of right had been determined. In either view they cannot raise the objection of want of jurisdiction.]

The lessors wish to have the decision of the Court on the merits.

Winslow, Q.C., and *Yate Lee*, proceeded to argue the case on the merits. There has been no forfeiture by reason of bankruptcy; a man is not a bankrupt until an adjudication is made against him, though, when the adjudication is made, the trustee's title relates back to the act of bankruptcy. A composition or scheme of arrangement may be agreed to and approved by the Court, and then there will not be a bankruptcy. The presentation of a bankruptcy petition by a debtor under the Bankruptcy Act, 1883, is not equivalent to the filing of a liquidation petition under the Bankruptcy Act, 1869. Indeed, a liquidation petition was not required by the Bankruptcy Act, 1869, as the commencement of proceedings for liquidation or composition; it was only required by the Bankruptcy Rules, 1870. There is nothing corresponding to such a petition provided for by the Act of 1883. The object of liquidation by arrangement was to get rid of bankruptcy altogether. Under a liquidation petition the debtor's property was immediately taken out of him and vested in a trustee. That is not so under a bankruptcy petition under the Act of 1883. The debtor will ultimately be adjudged a bankrupt, unless some other arrangement is accepted by the creditors and approved by the Court.

[MATHEW, J. What is aimed at by the forfeiture clause is the insolvency of the lessees. Under a liquidation petition there might be a composition. The debtors' property did not necessarily vest in a trustee.]

Sect. 149, sub-s. 2 (1), of the Act of 1883 does not apply.

(1) Sect. 149, sub-s. 2, "When by any act or instrument reference is made to the Bankruptcy Act, 1869, the act or instrument shall be construed and have effect as if reference were made therein to the corresponding provisions of this Act."

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If there has been a forfeiture, still the lessees are entitled to the fixtures. In an ordinary case of lessor and lessee the lessee is entitled to a reasonable time after the expiration of his term within which to remove fixtures which he is entitled to remove: *Stansfeld* v. *Mayor, &c., of Portsmouth* (1); *Ex parte Brook.* (2)

[DAY, J., referred to *London and Westminster Loan and Discount Co.* v. *Drake.* (3)]

Here the property in the articles in question is expressly given to the lessees, and this is not altered by the proviso as to the time of removal, which can only give the lessors a right to damages if the articles are not removed within the time specified.

Another objection is, that by virtue of s. 14, sub-s. 1 of the Conveyancing Act, 1881, a right of forfeiture under any proviso in a lease, for a breach of covenant or condition in the lease, is not enforceable "unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

[MATHEW, J. How can you remedy the breach?]

By dismissing the petition. The only object of the proviso was to prevent the lease from passing into other hands. Sect. 14 lays down a hard and fast rule; the lessor must in any case give notice to the lessee. Sub-s. 2 gives the Court power to relieve against forfeiture, and the Court would not allow valuable property to be swept away because of an accidental breach.

[DAY, J. Sub-s. 6 (1) says that s. 14 does not extend "to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest." That seems to exclude the present case.]

(1) 4 C. B. (N.S.) 120. (2) 10 Ch. D. 100.
(3) 6 C. B. (N.S.) 798.

In all the cases there mentioned the estate would have passed away entirely from the lessee. The bankruptcy petition may not result in that; if there is a composition the estate does not pass away from the lessee. *Doe* v. *Carter* (1) shews how strictly forfeiture clauses are construed.

Arthur Powell, for mortgagees of the lease. The mortgagees have been served with the order by the direction of the judge.

[CAVE, J. They are entitled to be heard.]

The mortgagees could not prevent the debtors from filing the petition. The Court will construe the words strictly, so as not, if possible, to deprive the mortgagees of their property. It has often been held that a lessee cannot by a voluntary surrender of his lease prejudice his mortgagee. Sub-s. 6 (2) of s. 14 does not apply, for the lessors do not claim to forfeit the lease on the ground of bankruptcy.

Arthur Charles, *Q.C.*, and *Horace Browne*, for the lessors. It is only under the Act of 1869 that liquidation by arrangement could be had. Though a petition for liquidation is not mentioned in the Act itself, it was required by rule 252 of the Bankruptcy Rules, 1870, as the commencement of liquidation or composition proceedings, and by s. 78 of the Act the rules are made of the same force as if they were enacted in the Act. If there was a liquidation the debtor's property passed to the trustee; if there was a composition the property remained in the debtor. By the Act of 1883 liquidation by arrangement has been done away with, but the initial machinery under a bankruptcy petition under the Act of 1883 is really identical with that under a liquidation petition under the Act of 1869.

[MATHEW, J. I think the bankruptcy petition under the present Act is substantially the same thing as the liquidation petition under the Act of 1869.

CAVE and DAY, JJ., concurred.]

As to s. 14 of the Conveyancing Act.

[MATHEW, J. We will not trouble you on that point.]

As to the provisions of the lease, after the forfeiture the tenant has no right of entry for any purpose.

(1) 8 T. R. 57.

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[CAVE, J. Is it material whether he can enter and take the articles, or whether the lessors are bound to hand them over to him?]

The articles mentioned in the schedule are part of the fabric of the building. The lessees must make good the damage caused by removal. They are not entitled to the full value of the articles. The lessors may have to pay the removal value, but the lessees have no right to enter and remove them. The tenant under an ordinary lease may remove trade fixtures during his term; he cannot do so after the term is at an end. The effect of the schedule in the present case is only to put into the category of trade fixtures things which would otherwise undoubtedly belong to the landlord. The words "shall be removable, &c.," restrict the generality of the clause. Clause 3 applies to articles not mentioned in the schedule, and it contains a positive agreement that they shall be removed before the end of the term. There was no such provision in *Stansfeld* v. *Mayor, &c., of Portsmouth.* (1) If they are not removed during the term the lessees' right to them is gone altogether.

[CAVE, J. The lessees cannot remove the fixtures, because they do not know whether the lessors will elect to forfeit the lease. If your argument is right, the lessees could never remove the fixtures at all. They become their property at the moment when they have no longer any power to remove them.]

What, then, can the provision as to the removal mean?

[CAVE, J. If they are not removed during the term by the lessees, the lessors must remove them and deliver them over to the lessees.]

The lessors are entitled to damages for the removal.

Winslow, Q.C., in reply.

MATHEW, J. The application to the county court was that the official receiver should be placed in possession of a mill and premises, and the fixtures and other articles therein which had belonged to the debtors, and from which it was said that the receiver had been improperly evicted. The first question which

(1) 4 C. B. (N.S.) 120.

was presented to us was one of jurisdiction, and that question depended upon whether the receiver had or had not been turned out of possession, that question, again, depending upon this, whether he had taken possession at the time when the lessors, the dock company, entered upon the premises. Upon hearing the evidence read there could be, as it seemed to us, no question that the receiver had entered first, and, so far as he was in possession as an officer of the Court, he was entitled to the protection of the Court. The lessors appear to have availed themselves of the absence of workmen to take possession by locking the doors of the premises, and upon that they asserted that the receiver had not been in possession when their rights supervened, and that, therefore, the county court had no jurisdiction to deal with the case. But we are all clearly of opinion that the receiver was entitled to the protection of the Court in the exercise of his duties as receiver, and that the dock company were wrong in taking the law into their own hands as they sought to do. That would have been sufficient in one point of view to dispose of the application, but the county court judge has dealt with the whole matter and with the very important question of the rights of the parties. It was with regard to that question that it was desired that the opinion of this Court should be taken, and therefore the learned counsel on each side agreed that no question of jurisdiction should be raised, and that we should deal with the matter on the footing that the county court had, and that this Court has entire jurisdiction.

The real question in controversy is this, whether in the events which have occurred, and having regard to the terms of the lease, the official receiver had any right to the articles referred to in the lease, and which have been spoken of as tenants' fixtures or trade fixtures. Now that depends first upon the question whether there had been a forfeiture of the lease. In order to determine whether there had been a forfeiture it is necessary to examine carefully the provisions contained in the lease. [The learned judge read the forfeiture clause and continued:—] Mr. Charles argued that, although in strictness it could not be said that the lessees had filed a petition in liquidation, they

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had taken steps under the Bankruptcy Act, 1883, which, having regard to the provisions of that Act, and in particular to s. 149, justified the lessors in saying that the clause of forfeiture applied. We were pressed, on the other hand, with the exact terms of the clause, and it was said that we must construe the clause strictly, and that, inasmuch as a petition in liquidation had not been, and indeed could not under the circumstances be filed, there had been no forfeiture. It is not necessary for me to say whether the forfeiture clause would have applied if the Act of 1883 had contained no special provision upon the subject, such as s. 149. My Brother Day seems to think that independently of s. 149 a forfeiture would have accrued. In my view, s. 149 clearly applies, and I think the filing a petition for liquidation is, within the meaning of this clause, analogous to filing a petition for the appointment of a receiver under the Bankruptcy Act, 1883, and that the provisions in each Act upon those several subjects are corresponding provisions within the meaning of s. 149. Therefore I am of opinion, and my learned Brothers agree with me, that there had been a forfeiture of the lease.

The next important question, is what were the consequences of the forfeiture? Mr. Charles says that the consequences are those which always follow when a landlord takes possession of premises in which fixtures have been placed by his tenant; if they have not been removed before the expiration of the term they belong to the landlord. On the other hand, the particular and precise provisions of the lease on the subject are relied on. [The learned judge referred to clause 4 of the covenant and clause 3 of the proviso, and continued:—] We are told that the articles referred to in clause 4 and described in the schedule are fixtures in the fullest sense of the term. Mr. Charles has spoken of them as part of the fabric of the building. The clause, therefore, is one which largely alters the common law rights of landlord and tenant. In my judgment it clearly makes the articles in question goods which are to belong to the lessees, and which they are to be entitled to remove upon the terms only of their making good all damage caused by the removal. They are to be the lessees' property without reference to the time at

which they are removed, the only condition being that the lessees are to make good all the damage done by their removal.

To some extent the one clause corresponds with the other, and they apparently overlap each other, because, as I gather, some of the articles described in clause 4 are machinery, and clause 3 says "but all the machinery and also all the other buildings erected by the lessees shall be their property." But then come these words, "and shall be removed by them previously to the determination or cesser of the said term, unless it shall be then mutually agreed by the said company and lessees that the company shall purchase them, the said lessees, in case the same shall be removed, to make good all damage which may be caused by such removal." The lessors propose to read that as if clause 3 had expunged clause 4, and had substituted a different provision for it, viz., that, unless the articles should be removed before the cesser of the term, they should belong to the landlords. That is certainly an alteration which I am not prepared to adopt; it is, to my mind, clearly not what the parties intended. There is no doubt an inaccuracy in the way in which the clause is framed, but we are not bound to construe it so critically as to defeat the obvious intention of the parties. It was never meant that these goods should be the property of the landlords; they are to be the tenants' property. That is stated over and over again. A provision is introduced as to the time of their removal, and for breach of that condition the lessees may be answerable in damages. It seems to me that the effect of the lease is to give the official receiver as representing the creditors the right to these fixtures and other articles, the right to enter and remove them, paying the damages occasioned by the removal, and the rights of the parties must, as it seems to me, be ascertained on that footing.

In deference, however, to what I understand to be the view of my learned Brothers, I will confine my judgment to this, which seems to me to be all that is needful for the present occasion, that the official receiver is entitled to these fixtures, and that the rights of the parties must be ascertained upon that footing. I was myself in the first instance disposed to go further, but, as my learned Brothers have a doubt about it, I will not insist on my

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own view. All that I decide is that the official receiver is entitled to the articles in question.

Cave, J. I agree with the judgment which has just been delivered, with the slight exception to which my Brother Mathew has just referred. The language of the two clauses which we are considering differs. In clause 4 it is said that the articles shall be the property of the lessees, and shall be removable by them, they making good all damage done by such removal. In that clause there is no time mentioned during which the articles are to be removed, and it may be (I do not think it is necessary to pronounce an opinion upon that), that under that clause the lessees are still entitled to enter and remove the articles mentioned in it. But the language of clause 3 of the proviso differs, and, while it states that on the determination or cesser of the term the machinery, &c., shall be the property of the lessees, it adds, "and shall be removed by them previously to the determination or cesser of the term." To my mind, those words create very considerable doubt whether the lessees are entitled to enter and remove the articles after the determination or cesser of the term, and whether in that case their right is not confined to requiring the lessors to deliver the articles to them, they, of course, compensating the lessors for any expense they are put to in removing them. I do not know that this will make any practical difference, except that in the one case the lessors, and in the other case the lessees, must remove the articles, and, inasmuch as the lessors are actually in possession of the premises, convenience seems to point to the lessors doing it, for they will be less likely to damage their own premises unnecessarily.

Day, J. I agree with my Brother Mathew's judgment except in one particular. I agree that there has been a forfeiture of the lease, but in coming to that conclusion I do not attach any consequence to sub-s. 2 of s. 149, because I do not think that that sub-section applies. If there were no such provision to be found in the Act, I should still be of opinion that there had been a forfeiture. It is true that the lessees did not become bankrupts,

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but, in my judgment, they did "file a petition in liquidation," using those words in the sense in which I take it they are used in the lease. "A petition in liquidation" is, in my view, not used as a technical expression, but is meant to represent any petition for the purpose of getting the lessee's affairs liquidated in what is popularly known as bankruptcy. I am not speaking of becoming bankrupt in the strict legal sense, but of liquidation under the bankruptcy law, and it seems to me that a petition for the appointment of an official receiver is presented for the purpose of getting the debtor's affairs liquidated, either in bankruptcy, which is a possible consequence, or by arrangement in some of the other ways provided by the Bankruptcy Act. It seems to me that the words "file a petition in liquidation," as used in this lease, are fully satisfied by the petition which the lessees did file for the purpose of getting their affairs liquidated by means of the appointment of an official receiver. Being of that opinion, I agree with my learned Brothers that there has been a forfeiture of the lease, and that the receiver is entitled to the articles in question.

Appeal allowed.

Solicitors for official receiver: *Waterhouse, Winterbotham, & Harrison, for S. Cozens-Hardy, Norwich.*

Solicitors for lessors: *Wedlake, Letts, & Wedlake, for Sir L. W. Jarvis, King's Lynn.*

Solicitor for mortgagees: *G. Whale, for Ginn & Matthew, Cambridge.*

W. L. C.

Considered. *In re* DEBTOR (No. 416 OF 1940) [1950] 1 Ch. 423

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June 24.

IN RE PRICE. EX PARTE FOREMAN.

Bankruptcy—Leaseholds—Disclaimer by Trustee—Extension of Time—Bankruptcy Act, 1883, *ss.* 55, 105, *sub-s.* 4—*Practice.*

Although the three months given to a trustee by s. 55, sub-s. 1, within which to disclaim onerous property, may have expired, the Court has power under s. 105, sub-s. 4, to grant the trustee an extension of time.

When a trustee applies for an extension of time, he should give some good reason for the indulgence he asks, and if the rights of other parties will be prejudiced by the time being extended, the Court will, as a general rule, put the trustee upon terms.

ON the 8th of February, 1884, G. Price, a builder, was adjudicated a bankrupt.

On the 22nd of February the first general meeting of the creditors was held. At this meeting E. Foreman was appointed trustee of the estate, and obtained his certificate as such on the 28th of February.

Part of the bankrupt's estate comprised long leaseholds, which he had mortgaged by sub-demise to E. Hatton and others.

The trustee took no steps to realize or disclaim the leaseholds during the three months given to a trustee by the 55th section of the Bankruptcy Act, 1883, within which to disclaim onerous property; but on the 7th of June served the mortgagees with a notice of motion that he might be granted a further period of two months, beyond the three months allowed by the 55th section to a trustee, in which to disclaim the property in question.

The application was supported by an affidavit of the trustee, who deposed that at the time of his appointment as trustee he made careful inquiry as to the sale of the property, and was advised that it would be extremely detrimental to offer it for sale until May or June, and he had therefore delayed offering the property for sale; and that it would be for the benefit of the estate if the application was granted.

June 17. *Mr. Matthews* (solicitor), for the trustee.

Finlay Knight, for the mortgagees. Under s. 23 of the late Bankruptcy Act no time was limited within which a trustee was

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to disclaim onerous property, except when he was served with a notice by the landlord under s. 24, and then he was bound to disclaim within twenty-eight days. But if he wanted an extension of the time he was bound to apply before the expiration of the twenty-eight days: *Ex parte Lovering.* (1) By sub-s. 1 of s. 55 of the present Act the trustee has three months within which to decide whether he will disclaim or not, which rather implies that he may not do it after that time, and there is no section in the Act which empowers the Court to extend the time unless s. 105, sub-s. 4, applies. But that section appears under a number of sections coming under the heading "procedure," and all relating to procedure. The 55th section does not relate to procedure, and therefore the 105th section does not apply to it.

[CAVE, J. I think the 4th sub-section of the 105th section is of general application, and cannot be limited in the way suggested.]

Then assuming the Court has power to extend the time, some reasonable grounds should be shewn for the indulgence that is asked. The three months expired on the 28th of May, and the trustee has had ample time in which to decide. His affidavit is insufficient. He has not attempted to sell, and gives no good reason for the delay. If further time is granted it should be upon terms.

[CAVE, J. What terms do you suggest?]

He should be bound to sell within a time to be fixed by the Court, and should undertake to pay the ground-rent, and to keep down the interest on the mortgage during the period of extension, that is, from the 28th of May until he sells.

Mr. Matthews, in reply.

CAVE, J. In this case I think the objections that have been raised on behalf of the mortgagees are well founded, and that I ought to grant the trustee an extension of time only for a fixed period, and on the terms that have been suggested, namely, on

(1) Law Rep. 9 Ch. 586.

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his undertaking to pay the ground-rent, and to keep down the interest on the mortgages during the period of extension. If the trustee wishes to retain the power to disclaim beyond the three months given him by the Act of Parliament, it is not fair that he should do it at the expense of the ground landlord and mortgagees. He cannot be allowed to keep their rights in suspense simply to accommodate himself. Under the circumstances I cannot grant an extension of time unless the trustee is prepared to give the undertaking I have indicated.

Mr. Matthews. The trustee has no estate, and cannot give the undertaking. He, therefore, asks for leave to disclaim at once.

CAVE, J. I cannot do that because the ground landlord is not before the Court. He has not been served with the present application. But I will grant the trustee an extension for one week from to-day, with liberty to serve notice of motion for leave to disclaim on all parties interested for this day week. I reserve all costs.

June 24. This matter came again before the Court, when leave to disclaim was granted to the trustee. Costs of all parties out of the estate.

Order accordingly.

Solicitors for trustee: *G. F. Hudson, Matthews, & Co.*
Solicitors for mortgagees: *Clarke & Calkin.*

H. L. F.

EX PARTE NICKOLL. IN RE WALKER. 1884 June 25.

Bankruptcy—Act of Bankruptcy—Notice of Suspension of Payment—Verbal Notice—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*)—*Bankruptcy Rules*, 1883, *rule* 11.

A notice by a debtor that he has suspended, or that he is about to suspend, payment of his debts need not, in order that it may constitute an act of bankruptcy, be in writing. It is sufficient if a verbal statement to that effect be made by the debtor to one of his creditors.

APPEAL by Messrs. Nickoll & Knight from the refusal by the judge of the County Court of Norfolk, holden at King's Lynn, of an application made by them that the official receiver, appointed under a bankruptcy petition presented by Messrs. Walker & Son, seed crushers and oil refiners at King's Lynn, might be ordered to deliver up to the applicants certain oil which was in the possession of the debtors at the date of the presentation of the petition, on the ground that it was the property of the applicants. The receiver alleged that the oil was in the possession of the debtors as reputed owners, with the consent of the applicants. One of the questions in dispute was whether the applicants had given a notice determining their consent to the possession of the debtors before the debtors had committed an act of bankruptcy. The notice was given on the 28th of February, 1884. The bankruptcy petition was presented in March, 1884, and on the 13th of March a receiving order was made. A Mr. Game, one of the creditors, deposed that on the evening of the the 26th of February, he saw both the debtors, and they distinctly told him that they had suspended payment in consequence of their bankers having allowed their bills to be returned. The receiver alleged that the debtors in making this statement to Game had committed an act of bankruptcy.

English Harrison (*Cohen, Q.C.*, with him) for the appellants. There was no sufficient notice of suspension (1) of payment

(1) Sect. 4, sub-s. 1, of the Bankruptcy Act, 1883, provides that "a debtor commits an act of bankruptcy in each of the following cases (inter alia):—

(*h*) If the debtor gives notice to

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within the meaning of sub-s. 1 (*h*) of s. 4 of the Bankruptcy Act, 1883, given by the debtors on the 26th of February. A mere conversation such as is proved here is not enough. It should be a formal notice, and it ought to be given by means of a written or printed circular sent to the creditors or to one of them: rule 11.

[MATHEW, J. Rule 11 refers to "notices required" by the Act or the rules. Is there anything which "requires" a debtor to give such a notice as this?

CAVE, J. Your argument comes to this, that if a debtor calls all his creditors together, and says by word of mouth, I am going to suspend payment, that is not an act of bankruptcy; but if he writes to one of them to the same effect it is an act of bankruptcy.]

It must be a definite formal notice; a mere loose conversation will not do.

The question was then argued on the evidence whether there was a trade custom which excluded the doctrine of reputed ownership.

Winslow, Q.C., and *Yate Lee*, for the official receiver.

English Harrison, in reply.

MATHEW, J. I am of opinion that the decision of the judge of the county court must be affirmed. It is said that the notice of suspension given by the debtors on the 26th of February is not a notice within the Act, and reference is made to rule 11. I think there is nothing in the objection. Mr. Harrison has given no reasons for his contention, and I decide against it without giving any reasons for my decision. [The learned judge then dealt with the evidence as to trade custom and decided that the alleged custom had not been proved.]

CAVE, J. I am entirely of the same opinion. I agree that an act of bankruptcy was committed by the debtors on the 26th of February, and I have nothing to add to what has been said by

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any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

By r. 11 of the Bankruptcy Rules, 1883, "All notices required by the Act or these rules shall be in writing, unless these rules otherwise provide, or the Court shall in any particular case otherwise order."

my brother Mathew. [The learned judge then reviewed the evidence and expressed his concurrence on the other point.]

Appeal dismissed with costs (1).

Solicitors for appellants: *Mercer & Mercer.*

Solicitors for official receiver: *Waterhouse, Winterbotham, & Harrison, for S. Cozens-Hardy, Norwich.*

W. L. C.

[IN THE COURT OF APPEAL.]

July 4.

EX PARTE OASTLER. IN RE FRIEDLANDER.

Bankruptcy—Act of Bankruptcy—Notice of Suspension of Payment—Verbal Declaration of Inability to pay Debts—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-ss.* 1 (*f*), 1 (*h*).

An oral statement made by a debtor to a creditor that he is unable to pay his debts in full, is not a notice that he has suspended, or is about to suspend, payment of his debts, so as to constitute an act of bankruptcy within sub-s. 1 (*h*) of s. 4 of the Bankruptcy Act, 1883.

Such a notice may be given orally, but it must be given formally and deliberately, and with the intention of giving notice.

APPEAL against an order made by Mr. Registrar Brougham on the 24th of June, 1884, rescinding a receiving order which he had on the 14th of May, 1884, made on a bankruptcy petition presented by Messrs. Oastler, Palmer & Co. against Berthold Friedlander, Arthur Massey Elsdale and Emil Roth, who carried on business in partnership as leather merchants, at Bermondsey and in Paris, under the firm of Friedlander & Co. The petition, which was presented on the 19th of April, 1884, alleged that the debtors had, within three months before the date of the presentation of the petition, committed an act of bankruptcy, by giving notice to all or some of their creditors that they had suspended, or were about to suspend, payment of their debts. To prove the alleged act of bankruptcy an affidavit was made by Foster Mortimore, who was a creditor of the debtors. He said that, having been instructed by the English creditors of the debtors

(1) See next case.

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Ex parte Oastler. In re Friedlander.

to proceed to Paris, he, in company with the solicitor for the English creditors, went to Paris on the 16th of April, 1884, and at the request of Friedlander and Elsdale, who were then residing in Paris, he and the solicitor had a conversation with them, when Friedlander stated in the presence of Elsdale that he had started in business six or seven years ago without any capital, and that he was unable to pay the debts of the firm; and he offered 20 per cent. dividend. He also stated that he could obtain assistance from his brother-in-law, who, however, would not assist him until he had made some arrangement with his creditors, and after he had obtained his discharge. Friedlander also said that, if the creditors would accept the composition he offered, the balance was to be a debt of honour, and they would pay the creditors the balance in full.

The Registrar discharged the receiving order, on the ground that, as the act of bankruptcy had been committed in Paris, the Court had a discretion as to making a receiving order.

The petitioning creditors appealed.

R. Vaughan Williams, for the appellants. The statements made by Friedlander in the conversation with Mortimore would, if they had been made in England, have amounted to a notice, within sub-s. 1 (*h*) of s. 4 of the Bankruptcy Act, 1883 (1), that the firm were about to suspend payment of their debts. If the Court has a discretion because the act of bankruptcy was committed in Paris, still sufficient ground was shewn for making the order.

[Baggallay, L.J. Is the conversation which is proved sufficient to constitute an act of bankruptcy?

Lindley, L.J. Did it amount to a notice that the debtors had suspended, or were about to suspend, payment of their debts?]

Yes. It has been decided by a Divisional Court in Bankruptcy

(1) Sect. 4, sub-s. 1, provides: "A debtor commits an act of bankruptcy in each of the following cases (inter alia):—

(*f*) "If he files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself."

(*h*) "If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

that the notice may be by word of mouth, that it need not be in writing: *Ex parte Nickoll* (1).

[COTTON, L.J. I think there can be no question about that.]

It cannot be necessary that the words "suspend payment" should be actually used. The object of the legislature was to obtain evidence that the condition of the debtor's finances is such that his estate ought to be distributed among his creditors. Here the suggestion made was that the whole body of the creditors should agree to forego 80 per cent. of their debts. That is an intimation that the debtors are unable to pay their creditors in full, and that they do not intend to pay more than 20 per cent. Friedlander said that he was unable to pay the debts of the firm. Suppose a debtor called all his creditors together, and told them, I am unable to pay my debts; would not that be a notice that he intended to suspend payment? Or suppose he went round to his creditors with a form of declaration of his inability to pay his debts, and read it over to them, could it be said that he was not giving them notice of his intention to suspend payment?

[BAGGALLAY, L.J. Sub-s. 1 (*f*) requires that a declaration of inability to pay debts should be "filed in the Court" in order that it may constitute an act of bankruptcy. Do you say that such a declaration, when it is not filed, is equivalent to a notice of suspension of payment, and is, therefore, an act of bankruptcy?]

If a debtor declared his intention to suspend payment of his debts, i.e., his inability to pay them, his affairs ought to be administered in bankruptcy at the option of his creditors, not at his own. A debtor's own petition is to allege that he is unable to pay his debts: s. 8. If a debtor admits to a creditor that he is in fact insolvent, the legislature thought that that admission was a sufficient ground for administering his affairs in bankruptcy.

[COTTON, L.J. A debtor may be unable to pay all his debts in full, and yet he may go on paying his creditors until he has exhausted every farthing he has.]

In the present case Friedlander intimated that even the 20 per cent. which he offered would not be paid out of his own moneys.

(1) Ante, p. 469.

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The reasonable inference is that he meant the creditors to understand that, at least as to 80 per cent. of his debts, he was about to suspend payment.

Cooper Willis, Q.C., and *Israel Davis*, for the debtors, were not heard.

Baggallay, L.J. In my opinion the conversation which is relied upon did not amount to such a notice of an intention to suspend payment as is contemplated by sub-s. 1 (*h*) of s. 4. It is suggested that the debtor in effect said, "I am unable to pay my debts," and that this is equivalent to saying, "I am about to suspend payment of my debts." I cannot so view it. Looking at sub-s. 1 (*f*) I do not think that a statement by a debtor that he is unable to pay his debts can be regarded as equivalent to a notice that he is about to suspend payment of his debts. In order that a declaration of inability to pay debts should constitute an act of bankruptcy, it is necessary that it should be "filed in the court." Probably actual filing would not be essential, but delivery of the declaration to the officer of the Court for the purpose of its being filed would be sufficient. But a certain formality is required, and it can hardly be that, when sub-s. 1 (*f*) requires that formality to be observed in order that the declaration should constitute an act of bankruptcy, a mere informal verbal declaration of inability to pay debts should constitute an act of bankruptcy under sub-s. 1 (*h*). I am of opinion that the statement which was made in the present case was not such a notice that the debtors were about to suspend payment as is required by sub-s. 1 (*h*).

Cotton, L.J. I am of the same opinion. Of course, all the circumstances must be taken into consideration, as well as the words which were used by the debtor. Even if the words "suspend payment" had been used in the present case, I think it would be a serious question whether under the circumstances there had been such a notice as is contemplated by sub-s. 1 (*h*). But the debtor did not in fact intimate either that he had suspended payment of his debts, or that he had any intention of stopping paying his creditors. He only said, My assets are

insufficient to pay my debts in full. If my creditors will make an arrangement with me, I can obtain assistance from my friends. That was not an intimation that he had suspended, or that he was about to suspend, payment of his debts; it was only an intimation that the creditors would get more in that way than they were likely to get in any other. To my mind, there is a great difference between saying, "If all my assets are distributed my creditors will not get 20s. in the pound," and saying, "If any creditor comes to me in the ordinary course for payment I shall not pay him," or "I have suspended the payment of my debts."

LINDLEY, L.J. I am of the same opinion. The first question is, what is the meaning of a debtor's "giving notice" that he has suspended, or is about to suspend, payment of his debts? I think it does not mean mere casual talk; it must be something formal and deliberate, something done by the debtor with a consciousness that he is "giving notice," and intended to be understood in that sense. An act of bankruptcy is a serious matter. I am of opinion that what was done in the present case did not amount to a "giving notice" within the Act. If it was a notice at all, it was only a notice that the debtor might have to pay his creditors a composition; not a notice that he had suspended, or that he was about to suspend, payment of his debts.

Appeal dismissed. (1)

Solicitors for appellants: *Emanuel & Lousada.*
Solicitors for debtors: *Atkinson & Dresser.*

W. L. C.

(1) See last case.

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June 25.

EX PARTE WHINNEY. IN RE SANDERS.

Bankruptcy—Bankruptcy Notice—"Final Judgment"—Company—Winding-up—Contributory—Balance Order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

A "balance order," made in the voluntary winding-up of a company on a contributory, for the payment of calls which had been made upon him before the commencement of the winding-up, is not a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, and therefore a bankruptcy notice cannot be issued in respect of such an order.

APPEAL from the County Court of Sussex holden at Brighton.

John Sanders was a contributory of the Britannia Fire Association, which was being wound up voluntarily. On the 21st of June, 1883, on the application of the liquidator, a balance order was made by Bacon, V.C., whereby it was ordered that Sanders should pay to the liquidator, within seven days after service of the order upon him, the sum of 100*l.*, being the amount due from him in respect of a call of 1*l.* per share made by the directors of the association anterior to the 7th of March, 1881, the date of the winding-up resolution, and 9*l.* 18*s.* 1*d.* for interest thereon. The order was served on Sanders on the 5th of September, 1883, but he failed to make the payment. On the 19th of May, 1884, the liquidator applied to the Brighton County Court to issue a bankruptcy notice against Sanders in respect of the 109*l.* 18*s.* 1*d.* The Registrar refused to issue the notice, on the ground that a "final judgment" had not been obtained by the liquidator against Sanders. The liquidator appealed ex parte.

C. Lyttleton Chubb (*Romer, Q.C.*, with him), for the appellant. The balance order is a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883. (1)

(1) Sect. 4 provides by sub-s. 1, "A debtor commits an act of bankruptcy in each of the following cases (inter alia):

"(*g.*) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, and he does not," within the time limited, "either comply with the requirements of the

A balance order is a summary mode of enforcing the payment of calls given to a liquidator by ss. 101, 133, 138 of the Companies Act, 1862. This case is not like *Ex parte Chinery*. (1) There it was attempted to enforce a garnishee order against the garnishee by means of a bankruptcy notice. But, of course, the garnishee was not a debtor of the judgment creditor; his debt was to the judgment debtor.

[CAVE, J. How do you make out that the liquidator is a creditor of the contributory? Is he a creditor before he obtains a judgment? Is it not implied in sub-s. 1 (*g*) that the person who may issue a bankruptcy notice must be a creditor before he obtains the judgment?]

Sect. 75 of the Companies Act, 1862, says that the liability to contribute to the assets of a company in the event of a winding up "shall be deemed to create a debt." The liquidator represents the company, and has to get in all moneys due to them.

[CAVE, J. The balance order is not an order finally disposing of the winding-up proceedings.]

It finally disposes of the question between the company and the contributory. The contributory had an opportunity of appearing and opposing the application for the order.

[MATHEW, J. An order could not be enforced as a judgment, but for the special provision of rule 24 of Order XLII. of the Rules of the Supreme Court, 1883.]

The winding-up is a voluntary one; there was no winding-up proceeding pending in the Court. Sect. 100 defines an "action" as "a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court." The balance order can be enforced by execution or sequestration.

[CAVE, J., referred to *Ex parte Schmitz*. (2) When there is a judgment the Court makes use of the words "adjudge" or "decree," not "order."]

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notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

(1) 12 Q. B. D. 342.

(2) 12 Q. B. D. 509.

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EX PARTE WHINNEY. IN RE SANDERS.

A decree may be made against a defaulting trustee to account, and then on further consideration, after the account has been taken, he may be ordered to pay what is found due. That is really a judgment, though the word "order" is used. There is nothing in the Bankruptcy Act to shew that the words "final judgment" in sub-s. 1 (*g*) were intended to be confined to a judgment in an action strictly so called commenced by writ.

MATHEW, J. I think that this application must be refused. Mr. Chubb has succeeded in shewing that the proceeding in question is as closely analogous to an action as can well be. It is a summary statutory proceeding in lieu of an action commenced by writ. But, however closely analogous the proceeding may be to an action, it is not, as it seems to me, a proceeding of the nature contemplated by sub-s. 1 (*g*), and the order is not one which comes within the meaning of the words "final judgment" as explained by the Lords Justices in *Ex parte Chinery*. (1) Certain statutes and rules have given the power to enforce an "order" in the same way as a "judgment." That course of legislation was commenced by the Act 1 & 2 Vict. c. 110, s. 18, and the rules under the Judicature Act contain an analogous provision. But when it is said that an "order" may be enforced in the same manner as a "judgment," this makes it the clearer that an "order" is not a "judgment." I respectfully concur in the view taken by the Court of Appeal that the words "final judgment" in sub-s. 1 (*g*) mean a final judgment in an action.

CAVE, J. I am of the same opinion. It appears to me that the point has been decided in the clearest possible way by *Ex parte Chinery*. (1) Cotton, L.J., in that case said (2) that the proceeding to obtain a garnishee order "is not an action, but a statutory proceeding, for the purpose, not of establishing any liability of the garnishee to the person who obtains the order, but of attaching a debt due by the garnishee to the debtor whose liability to the judgment creditor has been established by the judgment in the action. The latter part of the sub-section, I think, confirms this view, and indeed, everything in it, in my opinion, tends to

(1) 12 Q. B. D. 342. (2) 12 Q. B. D. at p. 346.

shew that the words 'final judgment' are used in their strict technical sense." So here the proceeding is part of a statutory proceeding for the purpose of winding up the affairs of the company, and to enable the officer who is appointed for that purpose, and who is not himself the creditor, to obtain payment of a sum due to the company, and to arrange the affairs of the company, which may or may not be in the course of winding-up by the Court. But it is not in the ordinary sense of the words a proceeding to ascertain the liability of a debtor to his creditor, and it does not finally dispose of any matter. I adopt (indeed I am bound by) the language used by Cotton, L.J., in *Ex parte Chinery* (1), and hold that this order is not a "final judgment" in the sense in which the words are used in sub-s. 1 (*g*).

Appeal dismissed.

Solicitors: *Deane, Chubb & Co.*

W. L. C.

[IN THE COURT OF APPEAL.]

June 27.

EX PARTE WOODALL. IN RE WOODALL.

Bankruptcy—Bankruptcy Notice—"Final Judgment"—Executor of original Judgment Creditor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Rules of Supreme Court*, 1883, *Order XLII., r.* 23.

The executor of a creditor who has obtained a final judgment is not entitled to issue a bankruptcy notice against the judgment debtor, unless he has obtained leave from the Court, under rule 23 of Order XLII. of the Rules of the Supreme Court of 1883, to issue execution on the judgment.

Under sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, the creditor who issues a bankruptcy notice must be in a position to issue execution on the judgment.

APPEAL from a receiving order made by Mr. Registrar Pepys.

On the 6th of December, 1879, William Houlston recovered a final judgment in an action in the Common Pleas Division of the High Court against William Woodall for 334*l.* 5*s.* 4*d.* debt, and 7*l.* 17*s.* costs. Houlston died on the 20th of July, 1882. Before his death, part of the judgment debt had been paid to him by

(1) 12 Q. B. D. 342.

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EX PARTE WOODALL. IN RE WOODALL.

Woodall. On the 10th of April, 1884, Houlston's executrix served a bankruptcy notice on Woodall, claiming the payment of 160*l.* 1*s.* 5*d.* as the balance due to her, as executrix of her husband, upon the judgment. She had not obtained leave from the Court, under rule 23 of Order XLII. of the Rules of the Supreme Court of 1883, to issue execution on the judgment. The bankruptcy notice was not complied with within the time limited, and on the 12th of May, 1884, the executrix presented a bankruptcy petition against Woodall, the act of bankruptcy alleged being his failure to comply with the bankruptcy notice. On the 29th of May the registrar made a receiving order. The debtor appealed.

T. Brett, and *H. Reed*, for the appellant. No act of bankruptcy has been committed, and therefore a receiving order ought not to have been made. The executor of a judgment creditor is not entitled to issue a bankruptcy notice against the judgment debtor under sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883 (1), until he has revived the judgment. The executor ought to obtain leave from the Court, under rule 23 of Order XLII. of the Rules of the Supreme Court, 1883, to issue execution on the judgment, a change having taken place by death in the party entitled to execution: *Baynard* v. *Simmons* (2); *Boynton* v. *Boynton* (3). No one is entitled to issue a bankruptcy notice under sub-s. 1 (*g*) who is not in a position to issue execution on

(1) Sect. 4 provides (sub-s. 1), "A debtor commits an act of bankruptcy in each of the following cases (inter alia):—

"(*g*.) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within seven days after service of the notice, in case the service is effected in England, and, in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

(2) 5 E. & B. 59.

(3) 4 App. Cas. 733.

the judgment. That sub-section is of a quasi penal nature and will be construed very strictly: *Ex parte Chinery* (1); *Ex parte Schmitz.* (2)

Sidney Woolf, for the executrix. Rule 23 of Order XLII. applies only to issuing execution on the judgment; it has no relation to proceedings in bankruptcy. The reason for that rule is shewn by the history of the law on the subject.

[LINDLEY, L.J. The writ of execution must conform to the judgment.]

Formerly if a person who claimed through the judgment creditor wished to enforce a judgment, he had to issue a writ of scire facias. A different procedure was introduced by the Common Law Procedure Act, 1852, s. 29, and now under the Judicature Rules the method of procedure is to apply for leave to issue execution on the judgment. But there is nothing to prevent the executor of a judgment creditor from taking proceedings in bankruptcy against the judgment debtor: *Ex parte Tanner.* (3) If a receiving order had been made against the debtor on the petition of another creditor, the executrix could have proved the judgment debt in the proceedings.

[COTTON, L.J. She is not the creditor who obtained the judgment.

LINDLEY, L.J. How could she require the debtor "to pay the judgment debt in accordance with the terms of the judgment?"]

If she obtained leave to issue execution under rule 23 of Order XLII., that would give her the remedy of execution on the judgment, but it would not make her the judgment creditor. The difficulty would remain. In bankruptcy it has always been held that an executor represents his testator. The word "creditor" in sub-s. 1 (*g*) means either the original creditor or his representative. An assignee of the debt could issue the notice. *Ex parte Chinery* (1) is distinguishable.

BAGGALLAY, L.J. The question is, whether the respondent is a "creditor" within the meaning of sub-s. 1 (*g*). The receiving order was made on the assumption that she, as the executrix

(1) 12 Q. B. D. 342. (2) 12 Q. B. D. 509.
(3) 1 Mont. & Mac. 292.

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Ex parte Woodall. In re Woodall.

of the deceased judgment creditor, was in effect a creditor who had obtained a final judgment against the debtor. The objection is that, as she is not the person who actually obtained the final judgment, it is essential that she should first have obtained leave from the Court, under r. 23 of Order XLII., to issue execution on the judgment. It is contended by Mr. Woolf that there is nothing in sub-s. 1 (*g*) to limit the generality of the expression, "a creditor who has obtained a final judgment," and that it must include the representative of the original creditor after his death, and his assignee. On the other hand, it is contended by the appellant that the representative of the person who originally obtained the final judgment does not fill the character of creditor under sub-s. 1 (*g*), if he has not obtained leave under r. 23 to issue execution. If it were not for the words which immediately follow, "and execution thereon not having been stayed," I think there would have been strong ground for adopting Mr. Woolf's view. But those words tend to shew that the creditor spoken of must be a person who is in a position to issue execution upon the final judgment. The original creditor is in that position, if there has been no stay of execution. If the person who applies for the notice is the executor of the original judgment creditor he does not, as I read the sub-section, fill the required character until he has obtained leave to issue execution on the judgment. On this ground I think that the appeal must be allowed, and the receiving order be discharged.

Cotton, L.J. I am of the same opinion. We must look at the terms of sub-s. 1 (*g*), which creates a statutory act of bankruptcy. There are two things which the creditor has to do: he must obtain a judgment, and he is to serve a bankruptcy notice. The same person is to do both things. We must also have regard to the words "execution thereon not having been stayed." It is true that in the present case execution on the judgment has not been stayed, but those words point to this, that the creditor must be in a position to issue execution. The executrix has not obtained the final judgment, and she is not in a position to issue execution on it. Mr. Woolf says that, if she cannot serve a bankruptcy notice now, she will never be able to do so, because, if she obtains leave to issue execution, she will still not be the creditor

who has obtained the judgment. In my opinion that would be too refined a construction of the sub-section. It is not necessary, under the present practice, that the executrix should be made a party to the record by scire facias, but she can obtain leave to issue execution on the judgment. In my opinion her proper course is to obtain leave to issue execution on the judgment, even if she does not desire actually to issue it; she will then be a creditor, or must be treated as a creditor, who has obtained a final judgment within the meaning of sub-s. 1 (*g*).

LINDLEY, L.J. I am of the same opinion. Until the executrix has obtained leave to issue execution on the judgment it seems to me impossible to say that she has brought herself within the true construction of sub-s. 1 (*g*). That sub-section confers a statutory power to do certain things, and the person who is to do them must be a "creditor who has obtained a final judgment." I do not doubt that the executrix is a creditor of the appellant, but she has not, in any sense of the words, obtained a final judgment against him. She can, however, by doing something else, place herself in the position of a creditor who has obtained a final judgment. The words "execution thereon not having been stayed" shew clearly what sort of a creditor is intended. It must be a creditor who is in a position to issue execution on the judgment; it is assumed that execution might have been stayed. Then the provision that the bankruptcy notice is to require the debtor to pay the judgment debt "in accordance with the terms of the judgment," tends in the same direction; the debtor cannot be required to pay "in accordance with the terms of the judgment" unless the creditor is in a position to issue execution. Mr. Woolf says that the words would not apply to the executrix, even if she had obtained leave to issue execution. But this is a mere verbal criticism; for all practical purposes, a person who has obtained leave to issue execution on the judgment is within the provision.

Appeal allowed.

Solicitor for debtor: *T. R. Watson.*
Solicitor for executrix: *W. R. Francis.*

1884
June 26.

Ex parte SOANES. In re WALKER.

Bankruptcy—Transfer of Proceedings—Certificate of Judge—Discretion—Appeal—Costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 97 (*sub-s.* 2), 104 (*sub-s.* 2)—*Bankruptcy Rules*, 1883, *rr.* 16, 17, 111 (3).

The refusal of the judge of a county court to grant a certificate, under rule 16 of the Bankruptcy Rules, 1883, that in his opinion the proceedings under a bankruptcy petition would be more advantageously conducted in another court, is an order from which an appeal lies, if the judge has refused to exercise his discretion in the matter.

In such a case the Court of Appeal, if it is of opinion that the certificate ought to have been granted, will not refer the matter back to the county court, but will itself grant the certificate.

Two partners in trade presented a bankruptcy petition in a county court. Their statement of affairs shewed that they had lost nearly 200,000*l.* in five years' trading. Some of the creditors applied to the judge for a certificate that in his opinion the proceedings would be more advantageously conducted in the London Court. The judge refused the application, on the ground that it was premature. An appeal was presented, but was afterwards withdrawn, and on this occasion some correspondence took place between the solicitors of the applicants and the solicitors of other creditors who opposed the proposed transfer. The application was afterwards renewed, and there was evidence that the debtors owed a large amount to creditors in London, Liverpool, and other places, and that, in order to carry out a proper investigation of their accounts, it would be necessary to refer to the books of various merchants in London with whom they had traded, and also to the books of their bankers and of the bankers' London agents. The judge refused the application, on the ground that the applicants were estopped by the correspondence between the solicitors from making it:—

Held, that there was no such estoppel, and that, as the judge had therefore decided on a wrong ground, he had in effect refused to exercise his discretionary power, and there was an appeal from his decision.

Held, also, that under the circumstances the proceedings would be more advantageously conducted in the London Court, and that the certificate asked for ought to have been granted, and the Divisional Court itself granted the certificate.

Per Cave, J. If an agreement not to renew the application for a certificate had been in fact entered into between the solicitors of the applicants and the solicitors of the other creditors, it could not have affected the power of the Court to make the certificate, though it might have affected the right of the applicants to costs.

Order made that the applicants should have their costs out of the debtors' assets, in case the creditors should ultimately approve of the proposed transfer.

Appeal from the County Court of Norfolk, holden at King's Lynn.

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Ex parte Soanes. In re Walker.

William Walker and Edward William Walker carried on in partnership the business of seed crushers and oil refiners at King's Lynn. On the 13th of March, 1884, they presented a bankruptcy petition to the county court, and a receiving order was made. The debtors' statement of affairs shewed that their unsecured debts amounted to 240,897*l.*, and that their assets amounted to 43,392*l.*, leaving a deficiency of 197,505*l.*, which their deficiency account shewed that they had lost in five years' trading. Their capital at the commencement of the account in June, 1879, was less than 2000*l.* Their creditors were principally seed merchants in London, Liverpool, and Hull. They owed about 60,000*l.* to their bankers, Messrs. Foster, of Cambridge. The first meeting of the creditors was held on the 27th of March, and was adjourned to the 24th of April, then to the 5th of June, and again to the 11th of July. The public examination of the debtors was held on the 10th of April, and was adjourned first to the 8th of May, then to the 12th of June, and again to the 18th of July. On the 2nd of April some large creditors applied to the judge of the county court for a certificate, under rule 16 of the Bankruptcy Rules, 1883, that in his opinion the proceedings would be more advantageously conducted in the London Bankruptcy Court. The judge refused the application, on the ground that it was premature. Notice of appeal from this decision was given, but some correspondence afterwards took place between the solicitor for the appellants and the solicitors of the bankers, which resulted in the withdrawal of the appeal. The application for the judge's certificate was renewed on the 4th of June. It was supported by evidence that the official receiver had realized nearly the whole of the debtors' estate; that the debtors, when under examination by the official receiver, had stated that, during the whole of their trading for five years anterior to the date of their petition, there had never been any full and proper balance sheet drawn up shewing the result of their trading in any one year. It was also stated that in order to carry out a proper investigation of the debtors' books, and for the purpose of checking their accounts, it would be necessary to refer from time to time to the books of the various merchants in

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London and elsewhere with whom the debtors had traded, and also to the books of their bankers, and of the London agents of the bankers. The judge refused the application, on the ground that, having regard to the correspondence which took place as to the withdrawal of the appeal, the applicants were estopped from renewing the application.

The applicants appealed.

Cooper Willis, *Q.C.*, and *Bray*, for the appellants. The first application for the judge's certificate was refused merely on the ground that it was premature in the then state of the proceedings. The applicants are in no way estopped by the correspondence from renewing the application. The judge has not dealt with the application on its merits; he has not exercised his discretion. (1) In the present case the London Court will be the more convenient for conducting an investigation into the debtors' affairs. There ought to be a full investigation of the deficiency of nearly 200,000*l.* which has accrued in five years.

F. Turner, for the debtors' bankers, Messrs. Foster, of Cam-

(1) Sect. 97 of the Bankruptcy Act, 1883, provides that

"(2.) Any proceedings in bankruptcy may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one court to another court, or may by the like authority be retained in the court in which the proceedings were commenced, although it may not be the court in which the proceedings ought to have been commenced."

By rule 16 of the Bankruptcy Rules, 1883, "Where the judge of a county court or the judge or a registrar of the High Court certifies that in his opinion a bankruptcy proceeding would be more advantageously conducted in some other court, the Registrar shall, if the opinion is certified before the first meeting of creditors, transmit the certificate to the official receiver, who shall lay the same before such meeting, and if it has been certified after such meeting, he shall transmit a copy of such certificate to the trustee, if there be one, and if not to the official receiver, who shall thereupon summon a meeting of creditors to consider the same."

Rule 17. "If within seven days after the first meeting, or, in any other case, within fourteen days after transmitting such notice to the official receiver or trustee, no resolution of the creditors objecting to such transfer shall be received by the Court through the Registrar, the transfer may be made accordingly; but if the creditors have so objected, the transfer shall not be made."

bridge, who were their largest creditors. This second application is made on identically the same grounds as the first application, which, it is admitted, was rightly refused.

[CAVE, J. If the majority of the creditors desire a transfer of the proceedings, why should they not have an opportunity of expressing their wishes? The creditors are the ultimate arbiters.]

The certificate of the judge is the condition precedent to the action of the creditors. The appellants are coming here without the certificate of the judge. The question of the wishes of the majority of the creditors does not arise till after the certificate is given. At any rate the application ought not to be made until after the appointment of a trustee.

Firth, for the debtors, and for some of the creditors at King's Lynn. There is no right of appeal from such an order; it is not an appealable order within s. 104. (1) The granting or refusing of a certificate of this kind is not an "order in a bankruptcy matter." The judge was merely exercising a discretionary power. At any rate, if he has refused to exercise his discretion, this Court cannot exercise it; it can only send the case back to him that he may exercise his discretion.

(1) Sect. 104 (2). "Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows:

"(*a.*) An appeal shall lie from the order of a county court to Her Majesty's Court of Appeal:

"(*d.*) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal."

Rule 111 (3). "No appeal shall be brought in respect of the omission by the Court appealed from to exercise any discretionary power, unless the Court shall in its judgment, or on application made at the hearing, have expressly refused to exercise such power, in which case the refusal may be made a ground of appeal."

By the Bankruptcy Appeals (County Courts) Act, 1884 (47 Vict. c. 9), s. 2, s. 104, sub-s. 2 of the Bankruptcy Act, 1883, is repealed, and instead thereof it is enacted that "an appeal shall lie in bankruptcy matters, at the instance of any person aggrieved, from the order of a county court to a Divisional Court of the High Court of Justice, of which the judge to whom bankruptcy business shall for the time be assigned, shall for the purpose of hearing such appeal be a member.

Rule 2A of the Bankruptcy Rules, 1883 (11th April, 1884), "In the Bankruptcy Rules, 1883, the term 'Court of Appeal' shall be deemed to include any Court to which under any Act for the time being in force, appeals shall lie from the Court as defined by the Bankruptcy Act, 1883, and the said rules."

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MATHEW, J. We differ from the conclusion at which the learned judge of the county court has arrived. We are satisfied that he considered the case most carefully, and took every pains to arrive at a proper conclusion, but, with every respect for his decision, we think he ought to have taken a different course. Now, the order against which the appeal is brought is an order declining to take any steps to enable a transfer of the bankruptcy proceedings to be made, on the ground that a correspondence had taken place which had precluded the present appellants from making the application. That correspondence has been read to us, and, with great deference to the view of the learned judge, it seems to me there is not a trace in it of anything like an agreement between the parties that this subsequent application should not be made. What happened was this. An earlier application made with the same object was refused, on the ground that it was premature. Against that refusal there was, in the first instance, an intention to appeal, and a deposit was paid into court to secure the costs of the respondents. But the parties then came together, the appeal was withdrawn, and the 20*l.* deposit was repaid, because it was no longer wanted. That there was a correspondence between the parties is true, but it is clear to my mind that the matter stood with regard to any subsequent application exactly as it did before. A subsequent application was made to the county court judge, and I agree with Mr. Turner that the learned judge went into the whole matter, but it is perfectly clear that his decision was based on a technical ground, and in that I think he made a mistake. When the appeal was first opened, I certainly understood that the counsel who appeared in the case desired that we should deal with it as if it was still before the county court judge, and that we should pronounce the judgment which we think he ought to have given. The arguments proceeded on that footing, and Mr. Turner never raised any question of jurisdiction; but very nearly at the end of the discussion, Mr. Firth, for the first time, raised the point that there is no right of appeal on such a matter as this, that without the certificate of the county court judge it would be impossible to take any steps towards the transfer of the proceedings, that he has power to withhold the certificate on any ground he chooses, and that the creditors have

no remedy, however capriciously or improperly the Court below may have refused to grant it. I do not concur in that view. Sect. 97 of the Act provides that "any proceeding in bankruptcy may at any time, and at any stage thereof, with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one court to another court, or may by the like authority be retained in the court in which the proceedings commenced." In this case an order has been made that the proceedings shall continue in the Court of King's Lynn. Is there no appeal against that order? It seems to me that s. 104 clearly applies, and that an appeal lies. As was pointed out, no appeal is to be entertained "except in conformity with such general rules as may for the time being be in force in relation to the appeal," and the application was made to the discretion of the judge. But that, as it appears to me, is met by rule 111, cl. 3, which provides that "no appeal shall be brought in respect of the omission of the Court appealed from to exercise any discretionary power, unless the Court shall in its judgment, or on application made at the hearing, have expressly refused to exercise such power, in which case the refusal may be made a ground of appeal." Now, in the present case, it is in my view perfectly clear that the learned judge absolutely refused to exercise his discretion. The case, therefore, to my mind, clearly comes within the provisions of rule 111. As to the point that the learned judge was precluded from going into the matter by the correspondence, I am bound to say I can find no agreement to that effect in the correspondence. I think, therefore, that the judge ought to have exercised his discretion, and it seems to me that, in accordance with the rules which I have read, on the matter coming before us as an appellate tribunal, it must be dealt with as it should have been by the Court of first instance, and that we must pronounce an order accordingly. We have therefore to deal with the merits of the case. Now this is a failure of a most disastrous kind, which necessitates thorough investigation—the investigation contemplated by the Act of Parliament—into the affairs of the debtors and the circumstances which led to the failure. What, then, is the first question which has to be dealt with when an application is made for a transfer of proceedings to

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another court? According to rule 16 the judge is to certify that in his opinion the proceedings "would be more advantageously conducted in some other court," not merely conducted with greater advantage to the estate, as has been suggested by the respondents' counsel, but that in the court to which it is proposed to transfer the proceedings the investigation can be more advantageously conducted than in the court in which they were commenced. I think we ought to deal with this question on the principle by which Courts are guided in dealing with the question of the venue for the trial of an action. I am satisfied that a primâ facie case has been made out that the proceedings in this case would be more advantageously conducted, and with greater convenience to the creditors, in the London Court, and I can see no counterbalancing inconvenience to any of the creditors or to the debtors themselves.

Such a primâ facie case having been made out, it seems to me that it was the duty of the learned judge to grant the certificate. I think that the certificate ought to issue under rule 16, and then it will be for the creditors to pronounce their decision on it. They may be induced at a meeting properly held to say that in their view the proceedings should still be carried on in the court in which they were commenced; but I think it clear that the learned judge ought to have granted the certificate, and consequently that the appeal must be allowed.

Cave, J. I am entirely of the same opinion, and I do not think it necessary to add anything to the judgment which has been delivered by my Brother Mathew, except on one point. The learned judge decided that he could not entertain the question, because there was an agreement between the parties not to apply again for a transfer. I am entirely of the opinion of my learned Brother that no such agreement has been shewn on the letters. But I desire to add, that, in my opinion, even if such an agreement had been shewn on the letters, it would in no way have precluded the learned judge from considering the matter. The contention is that, although the judge may be satisfied that the proceedings would be more advantageously conducted in some other court, and that a transfer would be for the general benefit

of the creditors, yet, if the solicitor representing some of the creditors chooses to preclude himself from making the application, the judge would be thereby prevented from doing that which he considers to be best. I cannot assent to that. This is not an ordinary case of litigation between adverse parties, and I hold it to be the duty of the Court to exercise its jurisdiction apart from any arrangement made between the solicitor of one creditor and the solicitor of another, and to say that the administration of the estate shall be conducted at the place which is most convenient and most advantageous for the creditors generally. Of course if any such agreement is made, there is ample power to deal with it in the way of costs. But I must protest against the notion that a solicitor representing A. and B., and another representing C. and D., can come to an agreement which shall prevent the Court from exercising its discretion in any way which it may deem most advantageous for the creditors generally.

Order of county court discharged, and certificate granted. Appellants to have costs out of the estate if the creditors shall ultimately approve of the transfer.

Solicitor for appellants: *F. W. Mount.*

Solicitor for bankers: *G. Whale, for Ginn & Matthew, Cambridge.*

Solicitors for debtors: *Duffield & Bruty.*

W. L. C.

1884

June 26.

EX PARTE THE BOARD OF TRADE. IN RE STRAND.

Bankruptcy—Costs—Taxation—Petitioner's Costs of Bankruptcy Petition—Costs incidental to Second Meeting of Creditors—"Proceeding in Court"—Jurisdiction—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 105, *sub-s.* 1—*Bankruptcy Rules*, 1883, *rr.* 100, 105.

The second meeting of creditors under a bankruptcy petition (held to consider the confirmation of a scheme of arrangement of the debtor's affairs accepted at the first meeting) is not a "proceeding in court" within the meaning of sub-s. 1 of s. 105 of the Bankruptcy Act, 1883, and the court has no power to order the costs of the petitioner incidental to that meeting to be paid out of the debtor's estate.

But the Court has power to order the petitioner's costs incidental to the public examination of the debtor to be paid out of the estate.

APPEAL from the County Court of Kent holden at Canterbury.

On the 23rd of January, 1884, R. F. Strand presented a bankruptcy petition in the Canterbury County Court, and a receiving order was made. The debtor's public examination was held on the 1st and 8th of February, and was attended by his solicitor on his behalf. The first meeting of the creditors was held on the 6th of February, when a resolution was passed unanimously, accepting a scheme proposed by the debtor for the arrangement of his affairs. The scheme was supported by the official receiver. It had been prepared by the debtor's solicitor on his behalf, and the solicitor attended the meeting. The second meeting of the creditors was held on the 15th of February. It was summoned by the official receiver, and the notice of the meeting was accompanied by a report from him favourable to the scheme. At the meeting, however, the receiver stated that he had been instructed by the Board of Trade to oppose the scheme. The debtor's solicitor attended this meeting also on his behalf, but under these circumstances he did not propose a resolution confirming the scheme, because he knew that the official receiver held proxies sufficient to prevent the carrying of such a resolution. The scheme, consequently fell through, and the debtor was afterwards adjudicated a bankrupt. The debtor's solicitor carried in for taxation his bill of costs, which included charges in connection with the two meetings of the creditors and the public examination, and the registrar allowed these charges. The Board of Trade, under the provisions of r. 104 of the Bank-

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ruptcy Rules, 1883, required the taxation to be reviewed by a bankruptcy taxing master of the High Court, and he disallowed the costs of both meetings and of the public examination, on the ground that no order had been made by the Court under r. 100 allowing those costs, and that the order of the registrar on the taxation was not an order of the Court. An application was then made to the county court by the debtor's solicitor, in the name and on behalf of the debtor, for an order that the official receiver should pay out of the assets the costs properly incurred by the solicitor for the debtor, of and incidental to the first and second meetings and the public examination of the debtor. The judge made an order that the official receiver should pay out of the assets the costs properly incurred by the solicitor, as solicitor for the debtor, of and incidental to the second meeting and the public examination. The order was headed "ex parte the debtor," and it purported to be made upon the application of the solicitor for the debtor. The Board of Trade and the official receiver appealed from the order. The notice of appeal was addressed (not to the debtor) but to the solicitor by name.

Chalmers, for the appellants.

Winslow, *Q.C.*, and *J. E. Linklater*, for the solicitor, took the preliminary objection that the order appealed from was made upon the application, and in favour, of the debtor. The notice of appeal ought to have been addressed to and served on the debtor, and not on his solicitor personally. The order might, in fact, enure for the solicitor's benefit, but the solicitor ought not to be substituted for his client as respondent to the appeal. The result might be to render him personally liable for costs.

Chalmers. The appellants do not ask for costs against the solicitor.

It was then arranged that the notice of appeal should be amended, by addressing it to the debtor instead of to the solicitor, and that the counsel who had been instructed to appear for the solicitor should appear for the debtor.

Chalmers, for the appellants. After the taxation made by the registrar of the county court had been, at the instance of the Board of Trade, reviewed by the taxing master of the High Court, the county court had no jurisdiction to review his taxation;

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that could only be done by the High Court. The removal of the taxation to the High Court is in the nature of a certiorari.

[CAVE, J. The judge of the county court has not directed the taxing master to review his taxation, but he has made a substantive order allowing the costs in question. The taxing master did not allow them because the Court had not previously made an order expressly (1) allowing them.]

After the receiving order had been made the debtor had no power to employ a solicitor at the expense of the estate. The second meeting of the creditors is not a "proceeding in court," and therefore s. 105 does not apply. The Court could not by an order made ex post facto authorize the employment of a solicitor by the debtor. At any rate, after the first meeting, the debtor is not entitled to incur the expense of employing a solicitor, unless some special ground is shewn. Rule 105 appears to contemplate a special order, it speaks of "taxed costs." If a debtor wishes to employ a solicitor after the appointment of a receiver, he ought

(1) Sect. 105 of the Bankruptcy Act, 1883, provides, (1.) "Subject to the provisions of this Act and to general rules, the costs of and incidental to any proceeding in court under this Act shall be in the discretion of the Court: provided that where any issue is tried by a jury the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the judge before whom such issue is tried shall otherwise order."

Rule 100 of the Bankruptcy Rules, 1883, "All costs shall be in the discretion of the Court, and shall be paid by such persons as the Court shall order."

Rule 104 (1). "The Board of Trade may require the taxation of the bills of costs, charges, fees, or disbursements of any solicitor, accountant, auctioneer, manager, or other person, where the taxation has been made by a registrar of a county court, to be reviewed by a bankruptcy taxing master of the High Court, and may appear on the review of such taxation; and where any such review is directed, the registrar of the county court shall forward to such Master of the High Court, the bill which is required to be reviewed, and such master shall review such taxation. If upon the review the bill is allowed at a lower sum than that allowed by the registrar of the county court, the amount disallowed shall be repaid to the trustee."

Rule 105. "The costs under a bankruptcy petition incurred prior to the first meeting of creditors shall be paid out of the estate in the following order of priority, unless the court otherwise orders, that is to say, first the ad valorem duty upon the assets realised; next, the actual expense incurred in realising any of the property or assets of the debtor; next, the fees payable to any officer of the court in respect of any business done by him under the Act; next, the remuneration of any special manager appointed by the official receiver; next, the taxed costs of the petitioner; and next, the charges of any person duly appointed to assist the debtor in the preparation of his statement of affairs."

to obtain some authority to do so, and an allowance from the receiver for the purpose.

Winslow, Q.C., and *J. E. Linklater*, for the debtor. At any rate the public examination of the debtor is a "proceeding in court," and the petitioner's costs of it are in the discretion of the Court. But everything which is done under the petition is really a "proceeding in court." The words "of and incidental to any proceeding in court," include the meetings of creditors. Rule 13 of the Bankruptcy Rules, 1883, which relates to "meetings summoned by the Court," occurs in Part I. of the Rules which is headed "Court Procedure." The first and second meetings are summoned by the official receiver. It was necessary that the scheme of arrangement should be drawn very carefully, and for that purpose the assistance of a solicitor was needed. The general power of the Court to allow costs is shewn by *Ex parte Pearce*. (1)

Chalmers, in reply. The scheme has to be settled at the first meeting; the second meeting is only for the purpose of confirming it or rejecting it. *Ex parte Pearce* (1) was a case under the Bankruptcy Act, 1869, which contained no provisions analogous to those of s. 105 of the present Act. The general provisions as to meetings of creditors are contained in Part II. of the Rules; r. 13 applies only to special meetings summoned by the Court. The second meeting of the creditors is altogether outside the court; the matter comes into court again when an application is made to the Court for its approval of the scheme. The order, in substance, amounts to a review of the taxation made by the master of the High Court. The public examination is no doubt a proceeding in court, but the review of the taxation must be made by the High Court.

MATHEW, J. The technical objection to the appeal which was raised by Mr. Winslow has been removed by an amendment of the notice of appeal, and the case has now to be decided upon the construction of the Bankruptcy Act and Rules of 1883, with regard to a very important question of jurisdiction. The costs in question, which were in the first instance allowed on taxation by the registrar of the county court, were struck out by the taxing

(1) 2 Ch. D. 320.

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master of the High Court, on the ground that no order allowing them had been made by the county court. Then the debtor applied to the county court for an order allowing the costs, and the judge made the order. It is said that he was asked to review the taxation made by the master of the High Court. I think it is perfectly clear that there has been no taxation by the master of the High Court, for he held that he had no authority to tax the costs in question, because the county court had not ordered them to be allowed. I think his decision was right under the circumstances. Had the county court judge, then, jurisdiction to make the order allowing these costs? They are the costs of and incidental to the second meeting of the creditors, and the public examination of the debtor. It has been practically admitted that there was jurisdiction as to the costs of the public examination, if the application had been made in time, and I cannot find any restriction as to the time for making it. The matter is reduced then to the question of the costs of the second meeting of the creditors. The phraseology of s. 105 must be looked at carefully; it speaks of "the costs of and incidental to any proceeding in court under this Act." Then there are rules 100 and 105, and these appear to me to exhaust the statutory provisions on the subject. It seems to me perfectly clear that the second meeting is not a proceeding in court. It is not under the jurisdiction of the Court. It is a meeting called to consider the confirmation of a scheme of arrangement of the debtor's affairs previously submitted to the first meeting. The functions of the Court are for the time in abeyance, and its jurisdiction is not revived until the scheme is submitted to the Court for its approval. Sect. 105, therefore, being subject to the rules, and there being no rules but rules 100 and 105 which apply to the case, in my opinion the second meeting is not a "proceeding in court," within the meaning of s. 105, and the judge had no power to allow the costs incidental to that meeting to be paid out of the estate.

CAVE, J. I am entirely of the same opinion, and for the same reasons.

Appeal allowed.

Solicitor for appellants: *Solicitor to Board of Trade.*
Solicitor for debtor: *A. R. Norman, Chatham.*

W. L. C.

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF OVER DARWEN *v.* THE JUSTICES OF THE PEACE FOR THE COUNTY OF LANCASTER.

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March 25.

Highway—Highway in Borough—Expenses of Maintenance—Contribution from County Authority—Highway Act, 1862 (25 & 26 *Vict. c.* 61), *s.* 2—*Highways* (*Amendment*) *Act*, 1878 (41 & 42 *Vict. c.* 77), *ss.* 13, 38.

By the Highway Act, 1862 (25 & 26 Vict. c. 61), s. 2, defining the word "county," "for the purposes of this Act all liberties and franchises except boroughs . . . shall be considered as forming part of that county by which they are surrounded."

By the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 38, "in this Act 'county' has the same meaning as it has in the Highway Acts, 1862, and 1864," and by s. 13, any road which has between the 31st of December, 1870, and the date of the Act, ceased to be a turnpike road, ... shall be deemed to be a main road; and one half of the expenses incurred in the maintenance shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area "by the county authority of the county in which such road is situate" out of the county rate. A road in the borough and highway area of Over Darwen, in Lancashire, ceased to be a turnpike road in 1877:—

Held, that, although for the purposes of the Highway Act, 1862, boroughs are not to be considered as forming parts of counties, yet, as the road was within the geographical limits of Lancashire, the county of Lancaster was the "county in which such road is situate" within 41 & 42 Vict. c. 77, s. 13, and the county authority was liable to pay half the expenses incurred in the maintenance of such road.

SPECIAL CASE.

The plaintiffs were the mayor, aldermen and burgesses of the borough of Over Darwen, in the county of Lancaster (hereinafter called "the corporation") and were the highway authority of the borough, and the borough was a highway area within the meaning of the Highways and Locomotives (Amendment) Act, 1878.

The defendants were the justices of the peace for the county of Lancaster (hereinafter called "the county authority.") The justices assembled in annual general session pursuant to the provisions of 38 Geo. 3, c. 58, were the county authority as defined by the Highways and Locomotives (Amendment) Act,

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1878, and the justices assembled as aforesaid at the annual general session, held on the 26th day of December, 1878, did by order declare, under the powers in them vested by the 20th section of the last mentioned Act, that the contributions towards the expenses incurred in repairing the main roads within the hundred of Blackburn should be paid out of a separate rate to be raised and charged upon the said hundred of Blackburn.

The town of Over Darwen was incorporated on the 22nd of March 1878, prior to which time, and from the year 1854, it was a local board district under the Public Health Acts 1848 to 1875, at the time of its incorporation it consisted solely of the township of Over Darwen, but by the Over Darwen Improvement Act, 1879, the borough boundaries were extended so as to include part of the township of Lower Darwen.

The Bolton and Blackburn turnpike road was constructed by turnpike trustees under an Act passed in the eleventh year of the reign of King George IV., intituled "An Act for more effectually repairing and improving the road from Bolton-le-Moors to Blackburn in the county palatine of Lancaster, with two branches of road therefrom, and for making and maintaining a branch of road to or near the village of Lower Darwen," which Act was renewed in 1862 by an Act intituled, "An Act for repairing and maintaining the road from the borough of Bolton to the borough of Blackburn, and a branch road connected therewith in the county palatine of Lancaster."

The Bolton and Blackburn road passed through the borough of Over Darwen.

The whole of the said roads constructed as aforesaid had ceased to be turnpike roads, the last collection of tolls having taken place on the 20th of July, 1877, and the last meeting of the trustees on the 19th day of December, 1877.

The borough had no separate court of quarter sessions, but the townships or part of townships comprised within its boundary were assessed and contributed to the said separate rate raised and charged upon the said hundred of Blackburn.

The Towns Improvement Act, 1847, had not been incorporated with any local Act in force within the borough.

In 1878 was passed the Highways and Locomotives (Amend-

ment) Act, 41 & 42 Vict. c. 77, s. 13 of which enacts that: "For the purposes of this Act, and subject to its provisions, any road which has, within the period between the 31st day of December 1870 and the date of the passing of this Act, ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one half of the expenses incurred from and after the 29th day of September 1878 by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area. be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction."

The corporation as such highway authority as aforesaid had under s. 13 of the said Act 41 & 42 Vict. c. 77, demanded from the said justices payment of one half of the expenses incurred by the said corporation as such highway authority as aforesaid for the year ending the 25th of March, 1883, in the maintenance of so much of the said Bolton and Blackburn main road as is situate within the borough aforesaid.

For the purpose of this case it was admitted that the road had been, and was, satisfactorily maintained within the borough. It was also agreed that no objection should be taken to an order for payment as hereinafter mentioned upon the ground that no formal certificate of such satisfactory maintenance had been in fact given.

The total amount of expenses incurred by the corporation as such highway authority upor the road within their area within the said period was 371*l.* 6*s.* 11*d.*, and one half thereof amounted to the sum of 185*l.* 13*s.* 6*d.*

The county authority refused to pay the said sum or any part thereof.

The question for the opinion of the Court was:—

Whether the county authority under the circumstances above stated was liable by virtue of the Highways and Locomotives

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(Amendment) Act, 1878, or otherwise, to pay out of the county rate the sum above demanded or any part thereof.

In case the Court should be of opinion that the said county authority was so liable, judgment with costs was to be entered for the plaintiffs, otherwise for the defendants with costs.

R. Henn Collins, Q.C., for the plaintiffs. All the conditions of 41 & 42 Vict. c. 77, s. 13, have been fulfilled. The road is in the county of Lancaster, and the defendants being the county authority are liable.

Gorst, Q.C. (*Blair* with him), for the defendants. It must be admitted that primâ facie the road being in Over Darwen, which is in Lancashire, the defendants would be liable as the county authority. But the interpretation clause shews that the word "county" as used in the Act does not mean the geographical county. When the Act passed, turnpike trusts were expiring all over the country, large towns at the termini of roads had more benefit from them than the rural districts had, and it was quite beyond the scheme of the Act to relieve boroughs at the expense of the county. By 41 & 42 Vict. c. 77, s. 38, the word "county" has the same meaning as it has in the Highway Act, 1862 (25 & 26 Vict. c. 61), which, by s. 2, the definition clause, enacts that for the purposes of this Act all liberties and franchises "except boroughs, shall be considered as forming part of that county by which they are surrounded." Boroughs, therefore, are not to be considered parts of the counties by which they are surrounded. There are provisions in the Act wholly inapplicable to roads in boroughs, ex gr., s. 26, giving the county authority power to make by-laws. If Over Darwen is to be considered to be in the county, the county authority would have a right to make by-laws, which might clash with by-laws which the mayor and corporation might make under the Public Health Act.

R. Henn Collins, Q.C., replied. The word "county" is used as a geographical and not technical expression in 41 & 42 Vict. c. 77, s. 38. If the contention for the defendants were correct, boroughs would contribute to county expenses, and yet get no return. But the intention of the Act is to give boroughs which contribute to county expenses a right to some return, and to exclude from that

right the boroughs which do not so contribute: see s. 14 and the definition of urban sanitary districts in s. 38. Lord Blackburn said in *Justices of Lancashire* v. *Mayor of Rochdale* (1), a decision on s. 13, "I think that the fact that Rochdale has a municipal corporation is purely an accident, and that it has nothing to do with the case which we have to consider." So here, the fact of Over Darwen being a borough is immaterial. The road is in the county of Lancaster, and s. 13 speaks not of parts of roads, but of the "county in which such road is situate." Lord Blackburn's opinion in the *Rochdale Case* (1) is certainly against the present point, and in the subsequent case of *Justices of West Riding* v. *The Queen* (2) Lord FitzGerald said the decision in that case did not militate against the prior decision of the House of Lords in *Justices of Lancashire* v. *Mayor of Rochdale* (3).

DAY, J. This special case is not free from difficulty arising from the exceedingly inconvenient language and form of these Acts of Parliament. We are referred by them from one statute to another, and find definitions expressed in words certainly ungrammatical, and, even apart from grammar, very difficult to understand. Putting the best construction I can put on the Acts it seems to me that the plaintiffs are entitled to judgment. The claim is based on s. 13 of the Act of 1878. The plaintiffs say that they are, and they are undoubtedly, the highway authority of the highway area within the meaning of the Act. The defendants are the county authority of Lancashire. The plaintiffs contend that the defendants are not only the county authority of Lancashire, in which county, geographically considered, the borough of Over Darwen and the highway area are situate, but are "the county authority of the county in which such road is situate," within the terms of 41 & 42 Vict. c. 77, s. 13. Primâ facie, as Mr. Gorst very fairly admitted, no substantial question would arise on that part of the case. If the defendants are the county authority of the county in which the highway area is situate, the plaintiffs are entitled to recover. But Mr. Gorst called our attention to the definition of "county" by the legislature.

(1) 8 App. Cas. 494, at p. 496. (2) 8 App. Cas. 781, at p. 797.
(3) 8 App. Cas. 494.

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By 41 & 42 Vict. c. 77, s. 38, "in this Act 'county' has the same meaning as it has in the Highway Acts, 1862 and 1864." Turning to those Acts, we find that by the Act of 1862 (25 & 26 Vict. c. 61), s. 2, "the word 'county' in this Act shall not include a 'county of a city' or a 'county of a town'"—the section says what the word "county" shall not mean, but not, in any positive language, what it shall mean,—"but where a county, as hereinbefore defined, is divided into ridings or other divisions having a separate court of quarter sessions of the peace, it shall mean each such division or riding, and not the entire county;" that is, the word "county" shall apply to a division or riding, which shall, for the purposes of this Act be deemed a separate county; "and for the purposes of this Act all liberties and franchises . . . except boroughs as hereinafter defined shall be considered as forming part of that county by which they are surrounded . . ." Reading the section in its natural sense, "boroughs" are excepted from the class of places called liberties and franchises. It is difficult to say that this is an enactment to the effect that boroughs shall not be included in the word "county." But I will give the defendants the benefit of the interpretation of this Act, and will assume that the intention of the legislature as expressed in the Act was that boroughs are not to be considered parts of counties for the purposes of this Act. What bearing has it on the case? Wherever in the Act the word "county" is used, even merely by way of description, must all boroughs be taken out of it? It appears to me not necessary to put so large a meaning on the enactment. It does not say that a borough shall not still remain within the geographical limits of the county in which it actually was before the Act, but only that a borough shall not be considered a part of a county for the purposes of the Act. So reading it, I find in s. 13 of the Act of 1878 these words: "one-half of the expenses of a main road are to be paid to the highway authority by the county authority" viz., according to the definition, the justices of the county in general quarter sessions assembled. Of what county?—"of the county in which such road is situate." The only county in which the road can be deemed to be situate here seems to me to be the geographical county of Lancaster. We can construe the Acts

in accordance with the probable meaning of the legislature by saying that although the borough is not to be deemed part of a county for the purposes of the Highway Act, 1862, still it does not cease to be situate within the geographical ambit of the county. The borough is within the county, and so also is the road. This seems to me to reconcile all difficulties on the one side or the other. Looking at s. 14, and the definition in s. 38 of "urban sanitary district," we find that where a borough has quarter sessions and does not contribute to the county expenses it would not be a highway area, and, not being a highway area, would not have the benefit of s. 13. That would be reasonable. Such borough not contributing to the general expenses should not be able to recover from the county. On the other hand, it would be unreasonable that a borough which does contribute to the county fund, and to the maintenance of the roads throughout the county, should not have the benefit of getting contributions from the county for expenses incurred in the maintenance of main roads. Our judgment is for the plaintiffs.

SMITH, J. The plaintiffs make their claim under 41 & 42 Vict. c. 77, s. 13, for half the expenses incurred in the maintenance of a road. The sole point arises on the defendants saying that, although they are the county authority, they are not "the county authority of the county in which such road is situate," within the meaning of that section, and if this point had to be decided without reference to s. 38 it would be easily settled, for Over Darwen is in Lancashire, and therefore the road passing through the borough is in Lancashire. The question raised on s. 38 was argued ably and strenuously by Mr. Gorst in *Justices of Lancashire* v. *Mayor of Rochdale* (1); it would have been enough for him in the House of Lords if he had made out his point there. But three of the learned Judges said nothing on it, and Lord Blackburn did not seem to think much of it; and the point was not decided. In the next case, *Justices of the West Riding* v. *The Queen* (2), this point would have been absolutely decisive. Mr. Gorst was not counsel in that case, and the point was not taken. I wish it had been. However, here it is now

(1) 8 App. Cas. 494. (2) 8 App. Cas. 781.

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before us, a Court of first instance. Sect. 38 says "county" has the same meaning as it has in the Highway Act, 1862. Sect. 2 of that Act may, as it seems to me, be read: "the word 'county' in this Act shall not include 'a county of a city' or a 'county of a town,' but where a county as hereinbefore defined"—viz., not including a county of a city or a county of a town—"is divided into ridings or other divisions having a separate court of quarter sessions of the peace, it shall mean each such division or riding and not the entire county;" 25 & 26 Vict. c. 61, s. 2. May we not say that that is the meaning attached by the Act of 1862 to the word "county," and that the rest of the section viz., "and for the purposes of this Act all liberties and franchises except the liberty of St. Albans which shall be considered a county, and except boroughs as hereinafter defined, shall be considered as forming part of that county by which they are surrounded"—merely prescribes what is to be done "for the purposes of this Act"? The enactment seems to me capable of that meaning. At all events, whether right or wrong, I agree with my brother Day, and I think that, looking at s. 13, we must treat "county" as meaning the sheriffs' county. For who are to pay the money to the highway authority? The justices of the county, viz., the justices of Lancashire—of the whole county. I do not think the road within the borough is excepted by reason of the 2nd section of the Highway Act, 1862.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Pritchard, Englefield & Co.*
Solicitors for defendants: *Ridsdale & Son.*

J. R.

JENKS AND OTHERS *v.* TURPIN AND ANOTHER. 1884

June 24.

Gaming—Common Gaming House—Unlawful Gaming within 17 *&* 18 *Vict. c.* 38, *s.* 4—"*Baccarat.*"

The 4th section of 17 & 18 Vict. c. 38 enacts that "any person, being the owner or occupier or having the use of any house, room, or place, who shall use the same for the purpose of unlawful gaming being carried on therein; and any person who, being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid; and every person having the care or management of or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid; and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place, may, on summary conviction thereof before any two justices of the peace, &c.," forfeit and pay a penalty not exceeding 500*l.*

A. was the proprietor of the Park Club, and was also occupier of the premises used by the club, and received the profits. B., C., D., and E. were members of the committee of management, whose duty it was to regulate the internal management of the club, and (amongst other things) to make bye-laws and regulations for the carrying it on and for the government of its members, who were elected by them. F., G., and H. were members of the club.

By the rules and regulations of the club, hazard was not to be played, dice were excluded, and the points at whist were limited to 1*l.*; all games were to be played for ready money; and under no pretence were strangers to be admitted in the card-room.

An entrance fee of 10 guineas and an annual subscription of 6 guineas was paid by each member of the club. The kitchen was conducted at a loss, and wines and cigars supplied at a slight excess over cost price. The profits accruing to the proprietor arose from the entrance-fees and subscriptions and what was called "card money." Members' cheques were cashed by the proprietor to the amount of 200*l.*, for which he charged 1 per cent.

The game of baccarat was played nightly, as follows,—About twelve persons at a time played at it. A special table was provided, with arrangements for the banker and players. Three packs of cards shuffled together were used. One card was dealt to each person, the banker included. The object of the game was to get 9 in pips or as near thereto as possible. After each had a card dealt to him and had seen it, it was at his option whether he would stand upon it or take another; and in the exercise of this option consisted the only semblance of skill in the game. If the banker had 9, and none of the others had, he swept the board: if he had not 9, but a less number, he won from all who were further from 9, and paid to all who were nearer to 9 than he was. The banker had a slight advantage, inasmuch as he had an extra "draw," and consequently with luck would win more quickly than an ordinary player.

Play commenced at 4.30 P.M., and continued till 7.30; commencing again at 10.30 P.M., and continuing till 3 and sometimes till 8 A.M. There was a fresh

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bank about every twenty minutes. A "regulation bank" was one held by any member who chose to take it by putting his name on a slate: it must not be less than 50*l.* Every third bank before 2 A.M. was a regulation bank. The other banks (which ordinarily ranged from 25*l.* to 300*l.*, but sometimes extended to 1000*l.* and even more,) were offered at auction. Each banker paid 1 per cent., and the punters (players) 5*s.* each, which was called "card money," up to 2 A.M.; after that hour 5*s.* an hour was charged until 5 A.M., when 1*l.* an hour was charged. The banker had to put down ready money to the amount of 300*l.*

Upon an information charging the eight persons above named with having committed offences against s. 4 of 17 & 18 Vict. c. 38, A., the proprietor, was adjudged to have been guilty of "keeping and using the Park Club for the purpose of unlawful gaming," and fined 500*l.* The four committee-men were adjudged to have been guilty, as persons "having the care or management of and assisting in conducting the business" of the house so kept and used for the purpose of unlawful gaming, and each fined 500*l.* The three players were also adjudged to have been guilty of the offence, as persons who "assisted by playing in conducting the business of the house so kept and used for the purpose of unlawful gaming," and were each fined 100*l.*:—

Held, that the proprietor of the club and the four members of the committee were properly convicted: but that the players,—though possibly liable to be indicted for unlawful gaming in a common gaming-house,—were not liable to be summarily convicted under this statute.

Per Hawkins, J. If the house in question had been opened and used for a double purpose, viz. as an honest social club for those who did not desire to play, as well as for the purposes of gaming for those who did, it would not the less be a house opened and kept "for the purpose of gaming."

To constitute "unlawful gaming," it is not necessary that the games played shall be *unlawful* games: it is enough that the play is carried on in a "common gaming-house." The expression "*unlawful* games" was intended by the legislature to cover and include some games which, being lawful in themselves, were only made unlawful when played in particular places or by particular persons.

It makes no difference that the use of the house and the gaming therein is limited to the subscribers or members of the club, and that it is not open to *all* persons who might be desirous of using it. It is not a *public*, but a *common* gaming-house, that is prohibited.

"Baccarat" is a game of chance, and unlawful within 17 & 18 Vict. c. 38, s. 4.

Excessive gaming, per se, is not any longer a legal offence: it was not an offence at common law; and there now exists no statute against it. But the fact that it is habitually carried on in a house kept for the purpose of gaming is cogent evidence for a jury or other tribunal called upon to determine whether the house in which it is carried on is a common gaming-house, so as to make the keeper of it liable to be indicted for a nuisance at common law.

Per Smith, J. A "common gaming-house" is a house kept or used for playing therein at any game of chance, or any mixed game of chance and skill in which (1) a bank is kept by one or more of the players exclusively of the others, or (2) in which any game is played the chances of which are not alike

favorable to all the players, including among the players the banker or other person by whom the game is managed or against whom the other players stake, play, or bet.

It is immaterial whether the bank is kept by the owner or occupier or keeper of the house or by one of the players.

CASE stated under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

The appellants were summoned before the chief metropolitan police magistrate, Sir James Ingham, for having, on the 1st of December, 1883, at 7 Park Place, St. James's Street, in the metropolitan district, each committed offences against s. 4 of 17 & 18 Vict. c. 38, which is as follows :—"Any person, being the owner or occupier or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein,—and any person who, being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid,—and every person having the care or management of or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid,—and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place,—may, on summary conviction thereof before any two justices of the peace (1), be adjudged by such justices to forfeit and pay such penalty not exceeding 500*l.* as to such justices shall seem fit; and may be further adjudged by such justices to pay such costs attending such conviction as to them shall seem reasonable; and, on the non-payment of such penalty and costs, or in the first instance, if to such justices it shall seem fit, may be committed to the common goal or house of correction, with or without hard labour, for any time not exceeding twelve calendar months."

The appellants had each a right to claim to be tried by a jury, according to s. 17 of 42 & 43 Vict. c. 49; but waived that right, and submitted to the magistrate's summary jurisdiction. It was further agreed that the cases of all the appellants should be heard and determined on the same evidence; each being allowed

(1) Or before a magistrate sitting in one of the metropolitan police courts.

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to make his defence either personally or by counsel or solicitor. There were similar summonses against all the defendants for committing the same alleged offence on the 28th and 29th of November, 1883; and, although the evidence of those offences was identical with that of the offence on the 1st of December on which the magistrate adjudicated, only one penalty for one offence was adjudged on conviction.

It was proved that Jenks was the proprietor of the Park Club and occupier of the house 7 Park Place, St. James's Street. It was proved that John C. Wilkinson, Sir Charles Cunningham, Lewis David Franklin, and Francis Phillips were members of the committee of management of the club; and that Arthur Fitch, Sussex Nesbit, and Frederick Charles Hayes were players of baccarat in the house on the 1st of December, 1883. The powers of the committee were set out in the rules of the club, a copy of which was annexed (1); and letters of the secretary shewed that the committee had given orders that between certain days baccarat should not be played by any members in the card-room; that, subsequently, the committee had resolved to allow the game of baccarat to be resumed by members in the card-room; and that finally, on the 18th of January, 1884, at a full meeting of the committee, a resolution was unanimously passed suspending the game of baccarat until after the 31st of January following.

The general facts are contained in the notes of the evidence, which, so far as they are material, were as follows:—

Inspector Donald Swanson: On the 19th of December, 1883, I went to the Park Club, 7 Park Place, St. James's Street, accompanied by Inspector Turpin. I saw the proprietor, Mr. Jenks, and Mr. Dillon, the secretary. I asked Mr. Jenks to tell me the particulars respecting the club that I would ask him. I wrote down in his presence what he said, and subsequently read it over to him. The statement is as follows:—"Morris Jenks says: The Park Club was opened by me in or about June or July, 1882. At the game of baccarat a regulation bank is one taken by one of the members in his turn who chooses to take it. It must not be less than 50*l*. Every third bank before 2 A.M. is a regulation bank. The other banks are offered at auction. Each banker pays 1 per cent., and the punters 5*s*. each, which is called "card-money," up to 2 A.M. After that hour, 5*s*. an hour is charged up till 5 A.M., when, to make

(1) These rules are referred to in the judgment of Smith, J.

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playing prohibitory, 1*l.* an hour is charged. The club is a proprietary one, of which I am the proprietor. The profits, if any, go to me. The profits arise from subscriptions and card-money. The kitchen has been a loss, and wine and cigars sold at almost cost price." On the 21st of December, I saw him again. He then said: "Members' cheques are cashed by my authority, and 1*l.* per cent. is charged as an insurance against bad cheques. I should not cash any members' cheques beyond a reasonable amount. I should cash cheques to the amount of 200*l.*, which I consider a reasonable amount." I understood the game was played according to the rules, and that each member could take the bank, by putting his name down on the slate.

Inspector Turpin corroborated.

Frederick Hatton, night steward of the Park Club: Mr. Jenks is the only proprietor I know. There is a card-room at the club: baccarat is played there nightly. It requires a special table, with arrangements for the banker and punters. My duties are in the card-room. About twelve gentlemen play nightly, beginning at 4.30 P.M., and ceasing at 7.30 P.M.; commencing again from 10.30 to 11 P.M. and continuing till 3 A.M and up to 8 A.M. There would be a fresh bank every twenty minutes. If the bank lost, the word "banco" would close the bank, which means that the punter declares to play for the amount of money in the bank. I cash the cheques for Mr. Jenks, amounting to 200*l.* to a member. I would cash more than one cheque a night for a member. The bank would not unusually amount to 300*l.*, I hand over all moneys to the proprietor; and I receive the money to cash cheques from Mr. Jenks. When the banker has lost his money, the bank is ended; but he can renew it three times, paying nothing for renewals. The banker has to put down ready money to the amount of 300*l.* The game is played sometimes with three packs of whist cards, so there would be 156 cards. There would be about sixteen deals before the cards would be exhausted, which takes about twenty minutes."

Stephen Coleman, one of the defendants, but not included in the conviction: I have been in the habit of playing baccarat at the club; and have seen banks from 25*l.* to 300*l.* I was present on the three nights specified in the summonses; and the game of baccarat was played on those nights upon the average I have named. The game has been higher. An open bank is 1000*l.* and upwards. I have known it reached very seldom,—possibly once a week. I never saw it over 1000*l.* The object of the game is to get nine. Ten is baccarat. The skill is in knowing when to draw, and when not to draw. All the fairly exercised skill in the world would not enable you to draw the nine of cards, if you had no luck. The nine beats every card below it. Baccarat is a fair game between the players, the chances are equal; and no advantage is to be had except from skill and luck. If I had funds, I would prefer to bank, as with luck I could win much quicker. The banker has a slight extra chance, because he can draw.

The magistrate found that all the defendants had been guilty of unlawful gaming.

He adjudged the appellant Jenks to have been guilty of the offence on the 1st of December, 1883 (as occupier or having the

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use of the said house), in keeping and using the house for the purpose of unlawful gaming, and fined him 500*l.*

He adjudged the appellants Wilkinson, Cunningham, Franklin, and Phillips to have been guilty of the offence, as persons who, being committee-men, had the management of and were assisting in conducting the business of the house so kept and used for the purpose of unlawful gaming, and fined each of them 500*l.* respectively.

He adjudged the appellants Fitch, Nesbit, and Hayes to have been guilty of the offence, as persons who assisted by playing in conducting the business of the house so kept and used for the purpose of unlawful gaming, and fined each of them 100*l.* respectively.

The questions were—first, was the gaming, according to the facts proved, unlawful? Secondly, were the appellants other than Jenks the proprietor and occupier, persons who in law, upon the facts proved, came within the descriptions mentioned in the Act, *i.e.* either having the management or assisting in conducting the business of the gaming-house?

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Charles Russell, Q.C. (*Poland* with him), for the appellants.

Besley (*E. Clarke, Q.C.*, with him), for the respondents.

All the statutes relating to gaming and gaming-houses and all the authorities referred to in the course of the argument are very fully set out and commented upon in the judgments.

Cur. adv. vult.

June 24. HAWKINS, J. Upon the facts stated in the case, there can be no doubt that Mr. Jenks was to all intents the occupier and keeper of the house in question, whatever were the purposes for which it was opened and kept. This, indeed, was not disputed upon the argument before us or before the learned magistrate before whom the case was heard. The real and only substantial question is whether it was opened and kept for the purpose of "unlawful gaming" being carried on therein.

On the part of the appellants it was argued that the primary

object in opening and keeping the house was that it might be used as an ordinary social club; and that, although there was undoubtedly nightly play in the house at which considerable sums of money were won and lost, nevertheless such play was merely incidental and ancillary to such primary object. On the other hand, the respondents contended that the primary object was that the house should be used for the purpose of gaming, just as much as the old gaming-houses were used, which it was the object of the statute to suppress; and that the social arrangements were merely subsidiary to its use for such gaming purposes,—indeed were necessary for the accommodation and comfort of the members of the club and covered its true character.

The learned magistrate took this latter view. Even if we differed from him, we should not be justified in reversing his decision, the question being purely one of fact. I do not, however, differ: on the contrary, I think the evidence in support of his conclusion is overwhelming. What are the admitted facts? We must assume Mr. Jenks to be a person of ordinary intelligence and business capacity, and, having no special regard or affection for the members of his club (who moreover were to be elected by the committee, and not by himself), to be at least desirous of making some profit out of the house. Now, the wine and cigars being sold at only a little above cost price, and the kitchen carried on at a loss, it may be taken that there was really no profit on these items: and I very much question whether the rent, repairs, insurance, rates, taxes, gas, water, candles, firing, salaries of day and night stewards, wages of servants, their maintenance and clothing, depreciation of furniture, &c., and interest on capital invested, could possibly be covered by the annual subscriptions and entrance fees of the members, the number of whom was in a great measure due to the fact that play would be the order of things for sixteen hours of the day.

The *printed* rules are no doubt admirable; and, from reading them, nobody would suppose there was even a soupçon of a gambling character about the establishment. Rule 21 says, "Hazard shall not be played in the club; nor shall dice be used in the club-house:" Rule 22. "The points at whist shall not exceed 1*l.*:" Rule 23. "All games shall be played for ready

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money only." One could almost imagine that these rules were framed expressly in order that they might be set up, if necessity arose, to vindicate the status of the club as one of a non-gambling character,—where a gentleman might dine and enjoy his rubber of whist if he pleased, but would not be permitted under any circumstances to gamble.

In the letter I do not find these rules were broken; but nothing could be less indicative than these rules of the nightly routine of the establishment. From half-past four in the afternoon till eight on the following morning those who liked could play. There was a night steward (Mr. Hatton) *whose duties were in the card room.* Baccarat was the game throughout the night, and at it thousands were nightly won and lost. Mr. Russell gave us a very vivid description of this game and the privileges and respective positions and chances of the bankers and players at it. And from the evidence we learn that no bank can be less than 50*l.*; that the ordinary regulation banks range from 50*l.* to 300*l.*; that an open bank sometimes reaches 1000*l.*; that ordinarily there is a fresh bank every twenty minutes; that a special table and arrangements are provided for the banker and punters; that for each bank three packs of cards are used; that for this accommodation Mr. Jenks received from each banker 1 per cent. and each punter 5*s.*, as card money, up to 2 A.M., after which 5*s.* an hour till 5 A.M., and after that time, *to make playing prohibitory,* 1*l.* an hour; and that members' cheques are cashed by Mr. Jenks at a charge of 1 per cent. For what purposes these cheques were cashed we can draw our own conclusions.

When all these facts are looked at even with a most indulgent eye, it is impossible for any man in his senses to doubt that the house was really opened and kept for the purpose of gaming at the game of baccarat as its main and principal object, and not as a mere social club, to which gambling even to a considerable extent was ancillary. I think it right, however, to add, that, if the house had been kept open for a double purpose, viz. as an honest social club for those who did not desire to play, as well as for the purpose of gaming for those who did, it would none the less be a house opened and kept "*for the purpose of gaming.*"

The enactment, however, under which this conviction took

place (17 & 18 Vict. c. 38, s. 4) is not directed against every person who keeps a house in which gaming takes place. It imposes a penalty only on those *who open, keep, or use* a house for the purpose of "*unlawful*" gaming being carried on therein, or *permit others so to do*, or *who assist in the management* of the business of such house.

This brings me to the first question submitted for our opinion, viz. whether the gaming for which this house was opened was *unlawful gaming*. In dealing with this question, I cannot help thinking that the learned magistrate has taken rather too narrow a view of the 4th section, in treating the question whether the gaming was unlawful as dependent upon whether the games played were *unlawful games*. The section makes no mention of unlawful games; nor does it in any way confine its operation to persons keeping houses for gaming at such games. It is directed generally against all persons keeping houses for the purpose of *unlawful gaming*. The illegality of the *gaming* is what we have to look to, and not merely the illegality of the game. Gaming may be unlawful by reason of the place in which it is carried on, or by reason of the unlawfulness of the game itself. The common law did not prohibit the playing at dice and cards: 11 Co. Rep. 87; *Sherbon* v. *Colebach* (1): they were not unlawful games. But the keeping of a common gaming-house was at common law an indictable offence: Hawk. P. C. book 1, c. 75, ss. 1, 6, Bacon's Abridgment, *Nuisance* A., vol. 5, p. 178. Can anybody doubt that, at common law, if dice and cards were played in a common gaming-house as part of the unlawful business thereof, such gaming would be unlawful, though the games in themselves were not so?

To me, therefore, it seems that, in order to determine whether the gaming was unlawful, two matters present themselves for consideration,—first, was this house a common gaming-house, in which *all* gaming was unlawful,—secondly, was it opened for the purpose of an unlawful game being played therein, so as to make that particular gaming unlawful. In considering the latter question, we have confined our attention to the game of baccarat,

(1) 2 Vent. 175.

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no other game played therein having been suggested to be an unlawful game.

First, was this house kept as a common gaming-house so as to make it an indictable nuisance at common law?

In Hawkins's Pleas of the Crown, book 1, c. 75, s. 6, it is said: "All common gaming-houses are nuisances in the eye of the law; not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood:" and in the following section (s. 7), the learned author says, "a common play-house may be a nuisance *if* it draws together such numbers of coaches or people as prove generally inconvenient to the places adjacent:" but he goes on to draw a distinction between nuisances so occasioned and such nuisances as bawdy-houses and common gaming-houses, stating that "play-houses are not nuisances in their own nature, but may only become such by accident; *whereas the others cannot but be nuisances.*" Speaking of gaming, Blackstone, in vol. 4, p. 171, says, "Next to that of luxury (1) naturally follows the *offence* of gaming, which is principally introduced to supply or retrieve the expenses occasioned by the former; it being a kind of tacit confession that the company engaged therein do in general exceed the bounds of their respective fortunes, and therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer. But, taken in any light, it is an offence of a most alarming nature, *tending by necessary consequence to promote public idleness* and debauchery among those of a lower class: and *among persons of a superior rank it hath frequently been attended with the sudden ruin and desolation of ancient and opulent families, an abandoned prostitution of every principle of honor and virtue, and too often hath ended in self-murder.*" Later on in the same section, he says: "It is the gaming in high life that demands the attention of the magistrate; a passion to which every valuable consideration is made a sacrifice." In Russell on Crimes, vol. 1, p. 428, the principle alleged upon which common gaming-houses are punishable as nuisances is said to be, that they

(1) Against which sumptuary laws then existed: see 4 Bl. Com. 170, s. 7.

are "detrimental to the public, as they promote cheating and other corrupt practices, and *incite to idleness* and avaricious ways of gaining property great numbers whose time might otherwise be employed for the good of the community." In *The King* v. *Rogier and Another* (1), which was an indictment for keeping a common gaming-house, Best, J., said: "Any practice which has a tendency to injure the public morals is a common-law offence:" and both he and Abbott, C.J., treated playing even at innocent games for excessive amounts as illegal. As to excessive gaming, however, I shall have a word or two to say hereafter.

After a careful consideration of the facts and of all that has been so ably addressed to us upon the subject, I have come to the conclusion that there was an abundance of evidence that in all its essential characteristics the Park Club was a "common gaming-house," and that as such the keeper of it might have been indicted as for a nuisance at common law. Its pernicious tendency cannot be doubted; and to it all the dicta of the various writers I have referred to might be truly applied; and the learned magistrate expressly finds that the game played at this house is one "which promotes idleness and avaricious ways of getting money, and that it unfits persons for the performance of their duties in life." It is true that no annoying interference in the public street can be pointed to, so that in that sense a public nuisance can be said to have been created; but that is not necessary,—see *Reg.* v. *Rice and Another.* (2)

In my judgment, the keeping a common gaming-house is in itself a *nuisance,* and the keeper of it is as such guilty of an indictable offence. Neither, although "*doubts seems to have arisen*" (3), do I think it makes any difference that the use of the house and the gaming therein was limited to the subscribers and members of the club, and that it was not open to *all* persons who might be desirous of using the same. If this could be set up as a defence to an indictment, any indictment for keeping a common gaming-house might be defeated. To no gaming-house is the public at large invited to go without restriction of some sort or other. The keeper of such a house has always the right to admit or

(1) 1 B. & C. 272; S. C. (and better reported) 2 D. & R. 431.

(2) Law Rep. 1 C. C. R. 21.

(3) 8 & 9 Vict. c. 109, s. 2.

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refuse admission to any one he pleases, or to make such rules as he may think fit for the regulation of such admission. Here, he placed himself in the hands of a committee to elect whom they would, provided only the number of members did not exceed five hundred. If the admission of five hundred persons to a gaming-house does not make it a common gaming-house, it might equally be said that the admission of five thousand would not. The law does not require that it shall be a public gaming-house: a *common* gaming-house is that which is forbidden, that is, a house in which a large number of persons are invited habitually to congregate for the purpose of gaming.

I now proceed to discuss the question whether this house was kept for the purpose of *unlawful* gaming, in the sense of gaming at *unlawful games*,—a somewhat difficult subject to deal with, because with very few exceptions no games have been in so many words by *name* declared to be unlawful; and yet, in using the words "*unlawful* games," it is clear the legislature intended them to cover and include some games which being lawful in themselves were only made unlawful when played in particular places or by particular persons. This I shall point out when I come to refer, as I must do, to the statutes cited in the course of the argument.

I have already stated that, at common law, the playing at any game was legal and permissible: 11 Co. Rep. 87. In *Sherbon* v. *Colebach* (1), A.D. 1691, which was an action to recover 20*l.* lost by the defendant to the plaintiff at hazard, the Court said: "Neither is play at dice in itself unlawful, though prohibited by several statutes to certain persons and to be used in certain places." Bacon's Abridgment, tit. *Gaming* (A.), however, states this with some qualification, viz. that such games must be played innocently and by way of recreation. The passage runs thus:—"It seems that by the common law the playing at cards, dice, &c., *when practised innocently and as a recreation, the better to fit a person for business*, is not at all unlawful nor punishable as any offence whatever." I do not find this qualification recognised in any reported case, or in any other of the old text-books. If played innocently and for *recreation only*, it would not be gaming

(1) 2 Vent. 175.

at all: see *Reg.* v. *Ashton.* (1) There, a publican was convicted "for suffering an unlawful game called dominoes to be played in his house," against the tenor of his licence, which makes it a condition that the party licensed "do not knowingly suffer any unlawful games or any gaming whatsoever therein." *It was not proved that any stake was played for.* The Court quashed the conviction. Lord Campbell, C.J., in giving judgment, said it had not been shewn that the game of dominoes was necessarily in itself unlawful; and, as to gaming, he said "parties may play at a game which is not in itself unlawful without gaming. . . . If money were staked, that would be gaming." I think, therefore, that, in the passage cited from Bacon's Abridgment, the writer only intended to state generally that innocent play was perfectly lawful, and not to leave it to be inferred that at *common law* to play at dice otherwise than for recreation was *un*lawful.

No case was cited to us, nor have I been able to find any, in which a person was held punishable at common law in respect of gaming, except for a nuisance as the keeper of a common gaming-house. We must take it therefore, I think, that at common law no game was in itself unlawful, and must look to the statutes alone to see what games are rendered unlawful by legislative enactments.

The first to which reference need be made of these statutes, 33 Hen. 8, c. 9, had for its main object, not so much the prevention of gaming, as a vice injurious to the morals of the people, as the advancement and maintenance of archery for the defence of the country, the science and practice of which had been neglected by the growing habit of playing at "unlawful games and play." It is intituled "The Bill for the maintaining artillery (2), and the debarring of unlawful games." By the 11th section it is enacted that no person shall for his gain keep any common house, alley, or places of (3) [bowling, coyting, cloysh-coats, half-bowl, tennis], *dicing-table, or carding,* or any other game prohibited by any statute heretofore made (4), or any unlawful new game then

(1) 1 E. & B. 286.

(2) Archery?

(3) The games within brackets and the like are by 8 & 9 Vict. c. 109, s. 1, declared to be no longer unlawful.

(4) 3 Hen. 8, c. 3, and 6 Hen. 8, c. 2.

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invented *or thereafter to be invented*, upon pain of 40*s.* for every day, &c. By the 12th section, every person using and haunting any of the said houses and plays, and *there playing*, is to forfeit each time 6*s.* 8*d.* The 16th section of the same Act imposed penalties on artificers, servants, &c., playing at unlawful games out of Christmas, &c., &c. The 17th section repealed all previous statutes made for the restraint of unlawful games. (1)

Now, in this statute, it will be observed, there is nothing to make any game *absolutely* unlawful. It is made unlawful to keep for gain any house for playing at such games as are specified in s. 11; and it is made penal for any person to play at such games in such houses; and persons of humble rank, such as artificers, are forbidden to play at such games out of Christmas or without licence, &c.; but that is all; the games, though *called unlawful*, are only forbidden to be played in certain places and by a specified class of persons only at specified times.

Next comes the statute 16 Car. 2, c. 7 (2), intituled "An Act against deceitful, disorderly, and excessive gaming." It was, as its preamble shews, passed for a totally different purpose than that contemplated by 33 Hen. 8, c. 9. It begins by reciting that "all *lawful games* and exercises *should not be otherwise used than as innocent and moderate* recreations (3), and not as constant trades or callings to gain a living or make unlawful advantage thereby." Then it goes on to recite that "by the immoderate use of them many mischiefs and inconveniences do arise," and among them the encouragement of idle and disorderly persons and the debauching of many of the younger sort both of the nobility, gentry, and others, to the loss of their time, the ruin of their fortunes, and the withdrawing them from laudable employment. The 2nd section of the Act is directed against fraud and deceit in playing

(1) The 22nd section makes it lawful for any servant by licence of his master to play at cards, dice, or table with him or any other gentleman in his master's house or presence; and by s. 23, noblemen and others possessing certain qualifications are authorized to license their servants and families to play at cards, dice, tables, bowls, or tennis. But these sections are repealed by 8 & 9 Vict. c. 109, s. 1.

(2) The whole of this Act is repealed, 8 & 9 Vict. c. 109, s. 15.

(3) This is probably the foundation of the passage in Bacon's Abridgment, *Gaming* (A), and Best, J.'s judgment in *Rex* v. *Rogier*, 2 D. & R. 437.

at any game. The 3rd section is directed against excessive and immoderate gaming, and enacts that, if any person shall play at any game (other than with and for ready money), and shall lose exceeding 100*l.* at any one time, he shall not be bound to pay, and the person winning shall forfeit treble the value of all he shall win above 100*l.* Again, it will be observed, in this statute no game is made unlawful in itself. In *Applegarth* v. *Colley* (1), Rolfe, B., said: "The Act (16 Car. 2, c. 7) itself, both in its title and preamble, appears to be directed solely against fraudulent and excessive, and to be in no respect pointed at moderate play when there is no fraud." (2)

Next in order comes 9 Anne, c. 14, intituled "An Act for the better preventing of excessive and deceitful gaming." (3) By s. 2, any person who shall at any one sitting lose 10*l.*, and shall pay the same, may within three months recover the same back from the winner: and, in case the person losing the money does not recover it back, any other person may recover the same and treble the value thereof,—one moiety for his own use, the other for the poor of the parish "where the *offence* shall be committed." The 5th section makes it an indictable offence to win any amount by fraudulent play, *or* to win of any person at any one time above the value of 10*l.* Sect. 6 is directed against persons who support themselves by gaming only: and it impowers justices of the peace to require from every person who appears to them to maintain the principal part of his expenses by gaming to find sureties for his good behaviour for twelve months, and in default to be committed to the common gaol. Again, it will be noted that no *game* is rendered unlawful; but *excessive* or *fraudulent* gaming at any game is made an indictable offence.

The 12 Geo. 2, c. 28 (4), intituled "An Act for the more effectual preventing of excessive and deceitful gaming," in the 1st section recites various statutes prohibiting lotteries, and then, after reciting that several persons have for many years past

(1) 10 M. & W. at p. 729.

(2) This judgment was before 8 & 9 Vict. c. 109.

(3) Repealed altogether, except as altered, by 5 & 6 Wm. 4, c. 41.

(4) Untouched by 8 & 9 Vict. c. 109.

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carried on and set up certain fraudulent games and lotteries to be determined by the chance of cards, under the denomination of the games of the ace of hearts, pharaoh, basset, and hazard, by s. 2 enacts that "the said games of the ace of hearts, pharaoh, basset, and hazard are and are thereby declared to be games or lotteries by cards or dice within the meaning of the Acts prohibiting lotteries, and that every person who shall keep the said games shall be subject to all the penalties inflicted upon persons keeping lotteries:" and in s. 3 it is enacted that every person who shall play or stake at either of the said games shall be liable to a penalty of 50*l.* In this, as in several other statutes, there is a provision that the Act shall not extend to prevent playing or gaming at any games within any of the Royal palaces. This statute expressly declared the games of ace of hearts, pharaoh, basset, and hazard to be lotteries, and on that account to be illegal.

In the following year, 13 Geo. 2, another statute was passed (13 Geo. 2, c. 19), which, after enacting some curious and interesting provisions (1) relating to horse-racing, and in s. 9 reciting that since the good and wholesome law made in the preceding year, *some fraudulent and deceitful games had been invented*, and that a game *called passage* was then daily practised and carried on, it was therefore enacted that the said game of passage *and every other game invented or to be invented, with a die or dice* (backgammon and the other games then played with the backgammon tables only excepted), shall be *deemed games or lotteries by dice;* and it inflicts penalties upon all persons keeping tables for playing, *or playing* at the said games. Passage and other games of a like nature played with dice are thus added to the list of unlawful games.

The 18 Geo. 2, c. 34, s. 1, after reciting the mischiefs attendant upon excessive gaming, &c., and that a "pernicious" game called roulet or roly-poly was daily practised, enacted that no person should keep any house for playing roulet or roly-poly, *or any other game with cards or dice already prohibited by law*, under penalties prescribed. By s. 2, it was enacted that, if any

(1) Since repealed by 3 & 4 Vict. c. 5.

person should *play at roulet* or *at any game with cards or dice already prohibited by law*, he should incur the penalties therein prescribed. By s. 8 of the same Act it was enacted that any person winning or losing at play at any one time 10*l.* should be liable to be indicted and fined five times the value of the sum so won or lost. (1) This Act, it will be seen, makes illegal the game of roulet, which is a game of chance.

The 25 Geo. 2, c. 36, throws but little light upon the subject. Sect. 8, however, enacts that any person who shall appear, act, or behave himself as master or as the person having the care, government, or management of any gaming-house, shall be deemed and taken to be the keeper thereof, and liable to be punished as such, notwithstanding he shall not in fact be the keeper or owner thereof.

In this state the law (so far as relates to the immediate question before us) was when 8 & 9 Vict. c. 109 (1845) was passed. By that Act, intituled "An Act to amend the law concerning games and wagers,"—after reciting that "the laws heretofore made in restraint of *unlawful gaming* have been found of no avail to prevent the mischiefs which may happen therefrom, and also apply to sundry games of skill from which the like mischiefs cannot arise," in s. 1 it is enacted that so much of 33 Hen. 8, c. 9, whereby any game of *mere skill*, such as bowling, coyting, cloysh-coyts, half-bowl, tennis, *or the like*, is declared an *unlawful* game, or which enacts any penalty for playing at any such game of skill as aforesaid, shall be repealed; and also so much of the said Act as makes it lawful for every master to license his servants, and for every nobleman, &c., to license his or their servants or family to play at cards, dice, or tables, or any unlawful game, shall be repealed; and no such license shall avail any person to exempt him from the danger or penalty of *playing at any unlawful game, or in any common gaming-house.*

Nothing could more clearly indicate the intention of the legislature to legalise to all persons and at all times *mere games of skill*, but to preserve in their integrity all the penalties which then attached to the playing at unlawful games anywhere, *or*

(1) This section repealed: 8 & 9 Vict. c. 109.

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gaming at all (even at lawful games) *in common gaming-houses*, and to deprive every person of the power to license such playing or gaming.

The 2nd section defines what, *in default of other evidence*, shall be sufficient to prove a house to be a common gaming-house. After reciting that doubts had arisen whether certain houses *alleged or reputed* to be opened for the use of the subscribers only, or not open to all persons desirous of using the same, are to be deemed common gaming-houses, it is declared and enacted that, "*in default of other evidence* proving any house or place to be a common gaming-house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove *that such house* or place *is kept* or used *for playing therein* at any *unlawful* game, and that a *bank is kept there by one or more of the players* exclusively of the others, *or* that the chances of *any* game played therein are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed or against whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming-house such as is contrary to law and forbidden to be kept by 33 Hen. 8." By s. 4 it is enacted that "the owner or keeper of any common gaming-house, and every person having the care and management thereof, and also every *banker*, croupier, and other person who shall act in any manner in conducting the business of any common gaming-house, shall, on conviction, besides any penalty or punishment he may be liable to under 33 Hen. 8, be liable to forfeit a penalty not exceeding 100*l*." The power to indict for keeping a common gaming-house is not taken away; but a summary conviction would be a bar to a subsequent indictment. By this statute (8 & 9 Vict. c. 109, s. 15) the statutes 16 Car. 2, c. 7, 9 Anne, c. 14 (so far as it is above referred to), and 18 Geo. 2, c. 34, so far as above mentioned, were repealed. The statute 16 & 17 Vict. c. 119, was directed to the suppression of betting-houses, and has no application to the present case.

Then came the statute 17 & 18 Vict. c. 38 (1854), under which the conviction in question was made. It is intituled "An Act for the suppression of gaming-houses." It recites the 8 & 9 Vict.

c. 109, and by s. 4 enacts that "any person being the owner or occupier, or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of *unlawful gaming* being carried on therein, and any person who, being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid, *and* any person having the care or management of *or in any manner assisting* in conducting the business of any house, room, or place kept or used for the purpose aforesaid, *and* any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place," may on summary conviction be adjudged to pay a penalty not exceeding 500*l.*, with costs, &c.

I have cited at some length these various statutes even where the provisions have been repealed, for the purpose of shewing the general current of legislation against gaming-houses, and making more intelligible what I am about to say upon the question as to what are "unlawful games" within the meaning of the statutes. I divide them into two classes,—first, those which are absolutely forbidden by name, and to the gaming at which a penalty is attached. This class includes ace of hearts, pharaoh (or faro), basset, and hazard, made illegal by 12 Geo. 2, c. 28; passage and every other game with a die or dice except backgammon, made illegal by 13 Geo. 2, c. 19; roulet (or roly-poly), made illegal by 18 Geo. 2, c. 34. The second class comprises a number of games not altogether prohibited under penal consequences, nor declared to be *altogether* illegal, but which nevertheless have been styled "unlawful" by the legislature, because the keeping of houses for playing them and the playing them therein by anybody were rendered illegal.

Now, the games thus treated as unlawful by 33 Hen. 8, c. 9, are bowling, coyting, cloysh-coyts, half-bowl, dicing, tennis, and carding, or any other manner of game prohibited by any statute thereafter made, *or any unlawful new game then invented or made*, or any other new unlawful game thereafter to be invented, found, had, or made. As to bowling, coyting, cloysh-coyts, half-bowl, and tennis,—these seem to have been games of mere skill; and, although they remained unlawful games until the year 1845, the

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statute of 33 Hen. 8, c. 9, was repealed as to them and all other like games of skill by 8 & 9 Vict. c. 109, s. 1. Since that statute the only games made unlawful by 33 Hen. 8, c. 9, are games of dice or cards, whether such games were known at the time of the passing of that statute or have been since invented. All such games, if they are games of chance, or games of chance and skill combined (which cannot be called games of *mere* skill), are in my opinion clearly within the meaning of the words unlawful games in 17 & 18 Vict. c. 38. The language of the 1st section of 8 & 9 Vict. c. 109, in referring to 33 Hen. 8, c. 9, and repealing only so much of it as applies to games of skill, is a strong indication of the intention of the legislature that all the other games mentioned in the statute of Hen. 8 were to continue to be treated as unlawful in the sense in and to the extent to which they were made unlawful by that statute, viz. unlawful if played in a house kept for playing at them.

The *unlawful* games, then, now are,—ace of hearts, pharaoh, basset, hazard, passage, roulet, every game of dice except backgammon, and every game of cards which is not a game of *mere* skill; and, I incline to add, any other game of mere chance.

Does baccarat come within this category? The description of the game given by Mr. Russell satisfies me that it does. It is a game of cards. It is a game of chance; and though, as in most other things, experience and judgment may make one player or banker more successful than another, it would be a perversion of words to say it was in any sense a game of mere skill. It is therefore, in my opinion, an unlawful game within the meaning of the statute. It is said that it is a game of modern invention. That may be; and, assuming it to be so, it is just what the legislature intended to include in the phraseology of the 11th section of 33 Hen. 8, c. 9, as "a new unlawful game hereafter to be invented." If I am right in this view, then, apart from any question whether the other evidence establishes this to be a common gaming-house, there is clearly sufficient to establish it as such under s. 11 of 8 & 9 Vict. c. 109.

I think it expedient to say that, since the repeal of the statutes of Anne and 18 Geo. 2, c. 34, I do not think excessive gaming upon any game would in itself render the game unlawful; for,

excessive gaming per se is not any longer a legal offence. It was not one at common-law, and there now exists no statute against it. The dictum of Lord Tenterden in *Rex* v. *Rogier* (1), that "the playing for large and excessive sums of money would of itself make any game unlawful," must be now read having regard to the fact that when that dictum was uttered the statute of Anne against excessive gaming was in full force. Nevertheless, though excessive gaming is no longer per se unlawful, the fact that it is habitually carried on in a house kept for the purpose of gaming is a cogent piece of evidence to be offered to a jury or other tribunal called on to determine whether the house is a common gaming-house, so as to make the keeper of it liable to be indicted for a nuisance at common law.

Being satisfied that Mr. Jenks was the occupier of the house, that he opened and kept it for the purpose of gaming at amongst other games baccarat, and that baccarat is an unlawful game within the meaning of the statute, I am of opinion that he was properly convicted under s. 4 of 17 & 18 Vict. c. 38, of opening and keeping a house for the purpose of unlawful gaming: and, having regard to what I have already said as to the house being a common gaming-house, I am of opinion that the conviction may also be supported upon the ground that *all* gaming therein, even at lawful games, was *unlawful gaming*. I have now disposed of the case so far as regards Mr. Jenks.

As regards the four members of the committee of management, Mr. Wilkinson, Sir Charles Cunningham, Mr. Franklin, and Mr. Phillips, having decided that the house was opened and kept for unlawful gaming, the only remaining question is, whether these appellants "had the care or management of *or in any manner assisted in conducting* the business thereof."

I am of opinion that they did undertake and had such care and management, and did so assist in conducting the business of the house. It is impossible to doubt that they were cognizant of the rules and regulations of the club, and of its true character. The 2nd rule expressly places the internal arrangement of the club *under the management of the committee*. The committee elect

(1) 1 B. & C. at p. 275; 2 D. & R. at p. 431.

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the members: they have power to make bye-laws for its regulation; and, above all, they exercised an authority with reference to this very game of baccarat, to allow it to be played or to suspend the game pending the proceedings before the magistrate. I think there was abundance of evidence to warrant their conviction.

And now, lastly, as to the players, Messrs. Fitch, Nesbit, and Haynes,—I do not find any evidence that they did more than play at baccarat in the house. By so doing, it may be that they to some extent enhanced the profits of the house; but it does not shew that they took any part in the care or management of it. A customer who buys an article at a shop might just as well be said to assist in conducting the business of the shop. The law does not make it an offence to add to the profits of a gaming establishment; it requires that there should be *assistance in conducting the establishment.* Whenever the legislature has intended to impose a penalty upon a mere player at an unlawful game, there has been an express enactment to that effect: see 33 Hen. 8, c. 9, s. 12; 16 Car. 2, c. 7, s. 3; 9 Anne, c. 14, s. 5; 12 Geo. 2, c. 28, s. 3; 13 Geo. 2, c. 19, s. 9; 18 Geo. 2, c. 34, s. 2, &c.

It is not necessary for us to inquire whether for playing at such a game as baccarat a player is subject to any penalty; it is sufficient for us to say that this conviction for assisting in conducting the business of the house cannot be sustained as against the mere players.

In the course of the argument it was asked, what is the magistrate to do with persons taken into custody in a common gaming-house under the authority of 33 Hen. 8, c. 9, or 8 & 9 Vict. c. 109, ss. 3, 6? It is not necessary now to answer that question: but I would refer to the 14th section of 33 Hen. 8, c. 9, which does not seem to have been repealed (1), and from which it would seem that the justices have power to require recognizances from such persons no more to haunt such gaming-houses or to play at such prohibited games. Moreover, the 12th section of 33 Hen. 8, c. 9, also unrepealed, imposes a penalty on persons playing in gaming-houses unlawful games, and 12 Geo. 2, c. 28, s. 3, also unrepealed,

(1) See 8 & 9 Vict. c. 109, ss. 1, 3, 6.

makes persons playing at ace of hearts, &c, liable to a penalty of 50*l.*: so also 13 Geo. 2, c. 19, s. 9, makes it penal to keep houses *or to play* at games of dice.

For the reasons above expressed, I am of opinion that the gaming in respect of which the conviction was made was unlawful; that, as regards the defendants Jenks, Wilkinson, Cunningham, Franklin, and Phillips, the conviction ought to be affirmed; but that, as regards the defendants Fitch, Nesbit, and Haynes, it ought to be quashed.

I have but a few words more to say. Mr. Russell, at the conclusion of his able argument for the appellants, appealed to us not to make a law to meet a defect in the laws as they now stand. We have no idea of doing so. We do but administer the law as we believe it to be and to have existed for many a long year, though it has been so often broken and disregarded with impunity that at last its existence seems to have been forgotten; and, quoting the language of Blackstone,—vol. 4, p. 173,—I say "Our laws against gaming are not so deficient as ourselves and our magistrates in putting those laws into execution."

SMITH, J. This is a case stated by Sir James Ingham for the opinion of this Court. The matter for determination is whether all or any of the defendants have been guilty of the offence created by s. 4 of 17 & 18 Vict. c. 38. That section enacts that "any person, being the owner or occupier or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of *unlawful gaming* being carried on therein, and any person who, being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid, and any person having the care or management of or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place, may, on summary conviction, be adjudged to forfeit and pay a penalty not exceeding 500*l.*"

The facts are as follows:—The appellant Morris Jenks was on

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the 1st of December, 1883, proprietor of and occupied the house No. 7, Park Place, St. James's Street. He opened the house for the purposes hereinafter detailed in the month of July, 1882, and kept it so open down to the 1st of December, 1883. The appellants Sir Charles Cunningham, Lewis David Franklin, John C. Wilkinson, and Francis Phillips, were members of the committee of management of what was called the Park Club, and which club existed at No. 7, Park Place, St. James's Street. The appellants Arthur Fitch, Sussex Nesbit, and Frederick Charles Hayes, were on the 1st of December, 1883, engaged in playing a game called baccarat at the house, and were members of the club, but were not otherwise interested in the house.

The appellant Jenks opened the house in July, 1882. He formed the club therein, which was called the Park Club. By the rules and regulations for the government of the same, it was provided (amongst other things) that the club should consist of five hundred members; that the internal arrangements of the club should be managed by a committee of not more than twelve members; that the election of candidates should be by the committee, and one black ball should exclude; that the entrance fee should be ten guineas, and the annual subscription six guineas; that under no pretence should strangers be admitted into the card-room; that hazard should not be played at the club, nor should dice be used in the club-house; that the points at whist should not exceed 1*l.*; that all games should be played for ready money only; and that the committee should have power to make such bye-laws and regulations as might appear necessary for the good order and better regulation of the club. There were other rules regarding the internal management of the establishment which to me seem immaterial to the present case.

The mode by which the appellant Jenks remunerated himself for opening and keeping the house was as follows:—1, by entrance fees; 2, by annual subscriptions; 3, by card-money and other money obtained from persons playing at cards in his house. The kitchen was carried on at a loss; and the wine and cigars were sold at almost cost price. There was no other source of income. I have not any account shewing the expenditure

necessary to be made for rent, servants, and other establishment-charges.

The following facts were proved:—From 4.30 in the afternoon until 3 the next morning, and at times until 8 the next morning, with the exception of some three hours between 7.30 and 10.30 P.M., there was played nightly at this house a game called baccarat. About twelve persons played at it at a time. To state it shortly, the game is as follows:—A special table is provided for the game, with arrangements for the banker and others playing. One of the persons playing keeps the bank, and is called the "banker;" the others playing are called "punters." The banker plays against the others, who all sit round the table. Three packs of cards shuffled together are used for the deal. One card is dealt to each player, the banker included. The object of the game is, to get "*nine in pips*," or as near up thereto as possible. After each player has had a card dealt to him and has seen it, it is at his option whether he will stand upon it or take another. In this consists what has been termed at the Bar the skill of the game, viz. the determining whether he will stand as he is or will take another card. If the banker has nine, and none of the others have, he sweeps the board. If he has not nine, but a less number, he wins from all who are further from nine, and pays to all who are nearer to nine than he is. The banker has a slight extra chance, and with luck can win much more quickly than an ordinary player.

The banks kept in this house ranged in amounts from a minimum of 25*l.* to a maximum of 1000*l.* The regulation bank, as it was called, was not less than 50*l.*, and would not unusually amount to 300*l.* Every third bank before 2 A.M. was a regulation bank. It took about twenty minutes to play for the respective amounts in each successive bank. There was a fresh bank about every twenty minutes. Upon each of these banks Jenks received 1 per cent. He also received 5*s.* from every player up to 2 A.M. After that hour, 5*s.* per hour was paid to him by each player up to 5 A.M.; and after that hour 1*l.* per hour was paid to him by each player. This was the game habitually and continuously played at No. 7, Park Street. Jenks also cashed cheques for the

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players up to 200*l.* in amount, charging for so doing 1 per cent. He would cash more than one cheque a night for a member.

From these facts two things in my judgment are patent, the one, that in this house a game of chance was habitually played, at which sums ranging from 25*l.* to 1000*l.* might be and at times were lost and won every successive twenty minutes whilst play existed,—the other, that Jenks by means of such play became possessed of money which dwarfed into insignificance the amounts received by him for entrance fees and annual subscriptions. I cannot define with accuracy what he actually received for permitting this play to take place in his house; but I must say that I think that the learned magistrate was not beyond the mark when he put it at between 40*l.* and 50*l.* a night.

These being the facts proved, and to which there was no contradiction, what did Jenks keep? A common gaming-house has been defined to be a house kept or used for playing therein at any game of chance, or any mixed game of chance and skill in which (1) a bank is kept by one or more of the players exclusively of the others, or (2) in which any game is played the chances of which are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed or against whom the other players stake, play, or bet. That constitutes a common gaming-house. Was No. 7, Park Street such? I say unquestionably yes.

It was suggested at the Bar that the bank must be kept by the owner or occupier or keeper of the house, and, if kept by one of the players, was not a bank within the above definition. I know of no such limitation; and I am of opinion that it does not exist. I entirely agree with the learned magistrate when he found that the club in this case was "either a pretence or a sham altogether, or was merely assistant to the main business which Jenks carried on, viz. that of gambling." Could anything be a greater farce in an establishment such as this was, when it was possible to lose 1000*l.* in some twenty minutes, than to have one of its rules (and it was suggested that these rules shewed that it was nothing but a bonâ fide club with an ordinary card-room) that "the points at whist should not exceed 1*l.*?" When the

learned counsel who argued for the appellants sought to liken the Park Club to Brookes's, White's and other well-known proprietary London Clubs, they sought to liken it to subject-matters to which it had no resemblance and had nothing in reality in common, excepting that each had a proprietor and each was called a club. In the one case, a gambling-house pure and simple was kept. In the others, this certainly was and is not the case. Holding as I do, and agreeing as I do with the learned magistrate when he held that the Park Club was nothing but a common gaming-house within the true definition of that term, the question comes, whether within s. 4 of 17 & 18 Vict. c. 38, Jenks did keep or use No. 7, Park Street, for the purpose of unlawful gaming being carried on therein.

It was admitted that he kept or used No. 7, Park Street, for the purpose of gaming: but it was strenuously argued that he did not do so for the purpose of *unlawful* gaming being carried on therein. It was argued that by 12 Geo. 2, c. 28, s. 1, to set up, maintain, or keep the games of the ace of hearts, pharaoh, basset, and hazard, was illegal; that, by 13 Geo. 2, c. 19, the game of passage and all games with one or more dice was illegal; that by 18 Geo. 2, c. 34, to keep any house, room, or place for playing roulet was illegal: and that gaming at these was the unlawful gaming aimed at by s. 4 of 17 & 18 Vict. c. 38, and none other.

I am of opinion that this is not so. When the Act of 17 & 18 Vict. c. 38 was passed, in the year 1854, it is common knowledge that the games of ace of hearts, pharaoh, and basset had fallen into disuse. I cannot suppose that the statute was passed simply to meet the game of hazard and games played with dice, and the keeping of a house in which to play roulet. These were by no means the only games by which gambling was carried on at that period. If this had been the intention of the legislature, in my judgment it would have particularized those three games, and not have used the most general words possible, viz. unlawful gaming. The real answer appears to me to be this: to play at a game of chance with cards for money in a common gaming-house is unlawful gaming. In other words, to game in a common gaming-house is unlawful. To keep a common gaming-house for the purpose of gaming therein is unlawful. To game therein must

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be either lawful or unlawful. It is not lawful: that is clear. What is it then? I say, unlawful. But is it so? It may be unlawful in the sense that the law will not aid it, and yet that the law will not punish it. In my judgment, this distinction does not apply to gaming in a common gaming-house; and I am of opinion that the law will punish it, and that it is unlawful, in the sense of being criminal. It follows consequently that to game in a common gaming-house is unlawful gaming, and criminal.

Holding, as I do, upon the facts proved, that No. 7, Park Street was kept as a common gaming-house, it is unnecessary to refer to s. 2 of 8 & 9 Vict. c. 109 as to what should be sufficient evidence to establish that a house was a common gaming-house; for, there is ample evidence in this case as to what No. 7, Park Place in reality was.

I wish also to add that what was said by Best, J., in *The King* v. *Rogier* (1) seems to me to be still good law, and therefore common sense, even though the statute of Anne has been repealed. He there says: "It is quite clear that any practice that has a tendency to injure public morals is a common-law offence. No game is unlawful in itself: but every game may be rendered so by playing at it for an excessive stake; for, it is the amount played for, and not the name or nature of the game which is the essence of it, and which constitutes an offence in the eyes of the law."

Much criticism was exercised upon this passage by the learned counsel for the appellants. What, it was asked, is an excessive stake? It was said that the criminality of a particular act could not depend upon the pecuniary means or position of the particular persons playing. What, it was urged, might be moderate to one man would be altogether excessive to another, and so on. It was said that the excess of the stake could have nothing to do with it. I do not agree. Can it be said that, as to the point whether particular gaming had or had not a tendency to injure public morals, it was immaterial whether it was played for counters of no value or for hundreds or thousands of pounds? It seems to me that it cannot. The tribunal before which each case comes will have to determine, if it becomes necessary, whether

(1) 2 D. & R. at p. 435.

the stakes played for, the position of the parties, and the circumstances under which they are played for, have or have not a tendency to injure public morals. I see no more difficulty in this than for the tribunal to decide whether a certain writing has a tendency to bring a man into discredit and disrepute, so as to constitute a libel; or having to decide whether certain acts and sayings have a tendency to alienate the affections of the people by bringing the government into disesteem, so as to constitute sedition; or having to decide, as it has daily to do, whether the facts proved do or do not constitute the offence charged. Each case must be adjudicated upon on its own merits. If the circumstances of a particular case of gaming are such as to lead the tribunal before which it comes to the conclusion that they tend to injure public morals, then I say that in my judgment the offence of unlawful gaming has also been established within the intent and meaning of s. 4 of 17 & 18 Vict. c. 38. If the circumstances of the particular case do not so tend, then the tribunal will so decide.

In the present case, as it seems to me for the reasons given above, it is unnecessary to determine this point; but, had it been, I apprehend that the Court would not have experienced any difficulty in making up its mind upon the subject. I am of opinion that Jenks was rightly convicted.

The next question which arises is, were the appellants the committee-men properly convicted? Were they persons, within the meaning of s. 4 of 17 & 18 Vict. c. 38, having the care or management of or in any manner assisting in conducting the business of the house?

The business, as before stated, was that of a common gaming-house for unlawful gaming. By the rules, the committee managed the internal arrangements of the so-called club: they elected those who were to be admitted therein: they were the persons who were to make bye-laws and regulations for the good order and better regulation of the same: they were the persons who had the power of excluding a member from the club: and it was also proved that, after the police had taken cognizance of what was going at No. 7 Park Street, they gave orders that between certain days baccarat should not be played by any members of

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the card-room; that they subsequently resolved to allow the game to be resumed; and that, finally, on the 18th of January, 1884, at a full meeting of the committee, a resolution was unanimously passed suspending the game until after the 31st of January, 1884. It seems to me that these appellants, the committee-men, did assist in conducting the business of the house within the meaning of the statute, and that the learned magistrate was quite right in so finding.

The last question is this,—were the three appellants who were merely players at the game on the 1st of December, 1883, rightly convicted?

This depends upon whether it can be said that they were in any manner *assisting in conducting the business* of the house. If a man goes into a shop and buys an article therein, can it be said that he is assisting in conducting the business of the shop? He certainly, as it seems to me, avails himself of the business there carried on; but, does he assist in *conducting the business* there carried on? I think not. It is, however, said that the appellants were members of the club. So they were; but, in my opinion, it cannot be maintained that by merely being a member of a club a man thereby assists in conducting its business. He, as before stated, avails himself of its business, but does not in my judgment assist in conducting it any more than a customer who purchases an article in a shop.

It was further urged that these appellants used the house, and therefore come within the words of s. 4 of 17 & 18 Vict. c. 38, which enacts that "any person, being owner or occupier, or having the use of any house, room, or place, who shall open, keep, or *use* the same for the purpose of unlawful gaming being carried on therein," may on conviction be adjudged, &c. In my judgment, the words "having the use of any house" point to a person having the use of a house as a licensee to carry on its business, and do not apply to a person merely going in to avail himself of the business which happens to be carried on therein. The words, moreover, in the section applying to persons advancing money for the purpose of gaming with persons frequenting ths house, seem to shew also that mere players were not aimed at by the section. I cannot and do not, therefore, agree with the

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learned magistrate as to this; and I think that the players were wrongly convicted of the charge preferred against them under the statute. Whether they were guilty of a common-law misdemeanor is another matter.

My Brother Hawkins has gone through the whole of the statutes and cases brought to our notice by the learned counsel who argued the case; and I do not again refer to them.

I am of opinion, for these reasons, that the conviction against Jenks and the committee-men should be affirmed with costs of this appeal; and that the conviction against the three players should be quashed.

Judgment accordingly.

Leave to appeal was granted, but was not acted upon.

Solicitors for appellants: *Lewis & Lewis.*

Solicitors for respondents: *Wontner & Sons.*

J. S.

[IN THE COURT OF APPEAL.]

May 1.

MACDONALD *v.* THE TACQUAH GOLD MINES COMPANY.

Attachment of Debts—Garnishee Order—Debt due to Judgment Debtor and Another jointly.

The debt, legal or equitable, owing by a garnishee to a judgment debtor, which can be attached to answer the judgment debt, must be a debt due to such judgment debtor alone, and where it is only due to him jointly with another person it cannot be so attached.

THE plaintiff, who was the judgment creditor of one Fitzgerald in respect of a judgment for 2743*l.* and costs, obtained a garnishee order under Order XLV., rule 2, of the rules of the Supreme Court, 1875, for attaching debts owing or accruing from the defendant company to such judgment debtor to answer the judgment debt.

The judgment debtor, Fitzgerald, jointly with one Horton, sold and assigned their interest in certain mines on the Gold Coast of West Africa for 10,000*l.* to the defendants, but only 2500*l.* of such purchase-money was paid, and by a mortgage deed of the 20th of February, 1882, the defendants covenanted with Horton and Fitzgerald to pay to Horton and Fitzgerald, on the

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13th of March, 1882, 7500*l.*, the balance then remaining due to them in respect of such purchase-money of 10,000*l.*; and the deed contained a declaration by Horton and Fitzgerald that the 7500*l.* so due to them was money belonging to them upon a joint account in equity as well as at law. It was admitted by the defendants that, independently of what was owing under this mortgage deed, there was a sum of 67*l.* 14*s.* 2*d.* due from them to Fitzgerald, and there was no question as to the plaintiff, as such judgment creditor, being entitled to this sum; but the question in dispute was whether there was a debt attachable under the garnishee order in respect of Fitzgerald's share in the balance owing of the 10,000*l.* purchase-money, which share was said to be two-thirds. Under these circumstances a garnishee issue was directed to be tried as to whether there was, on the 23rd of April, 1883, a sum due or which would accrue due to Fitzgerald, to the amount of 2743*l.* or less, in respect of his share of the balance remaining unpaid by the defendants pursuant to the deed of the 20th of February, 1882.

This issue was tried before Baggallay, L.J., at Maidstone, in July, 1883, when, the jury being discharged, the learned judge decided, on the authority of *Nash* v. *Pease* (1), that Fitzgerald's share of the balance due under such deed, which was 1688*l.* 10*s.* 10*d.*, could be attached.

The defendants appealed.

Finlay, Q.C., and *Percy Gye*, for the defendants. The garnishee order was made under Order XLV., rule 2, of the rules of 1875 (the new rule, Order XLV., rule 1, is in all respects similar), and *Webb* v. *Stenton* (2) decides that at the time when the garnishee order is made, the garnishee must be indebted to the judgment debtor in a debt, legal or equitable, whether payable then or at a future time.

[BOWEN, L J. The issue is whether a sum was due. Might not that have been amended at the trial?]

Yes. The point in dispute was, in fact, whether there was a debt due to the judgment debtor. In this case the only debt under the mortgage deed was one to the judgment debtor jointly with Horton. There was no debt to the judgment debtor alone,

(1) 47 L. J. (Q. B.) 766. (2) 11 Q. B. D. 518.

and there was, therefore, no debt which could be attached to answer the judgment debt. If Fitzgerald had sued for this debt, he would have been nonsuited if he had sued alone without joining Horton. *Petrie* v. *Bury* (1) and *Scott* v. *Godwin* (2) shew that all joint covenantees must sue. *Nash* v. *Pease* (3) was a different case from the present, but no reason for the judgment is given there by Kelly, C.B.

E. Clarke, Q.C., and *Morton Smith*, for the plaintiff. By the mortgage deed the 7500*l.* was payable to Horton and Fitzgerald jointly, and by an agreement between them Fitzgerald was entitled to two-thirds of that sum. In *Luke* v. *South Kensington Hotel Company* (4) it was held that one of several mortgagees may maintain an action to foreclose the mortgage, making the others co-defendants, if they are unwilling to be joined as plaintiffs. The same principle would apply here to the right of Fitzgerald to his share in the 7500*l.* The issue was to inquire what was the share of this money due to Fitzgerald, and that was found by the Lord Justice at the trial in the terms of the issue. The debt, no doubt, was a debt due to two, but of that debt the judgment debtor was entitled to two-thirds. Moreover, Horton has since died, and the sum is now due to his survivor.

BRETT, M.R. The first question to be determined is what is the meaning of the issue the parties want to try in this case. The issue was whether on a certain day there was "a sum due or which would accrue due to F. Fitzgerald" in respect of his share in the balance remaining due by the defendant company pursuant to the deed of the 20th of February, 1882. Now considering that this was an issue in a garnishee proceeding, the only sum which could be material was a sum which was a debt, and therefore the word "sum" in this issue must, in my opinion, mean a debt; but I agree that even if it could not properly be so read, it ought at the trial to have been treated as a debt and amended accordingly, since that was what the parties must have known they went to try, and therefore in either view the word "sum" in this issue should be treated as a debt. Now the case of *Webb* v. *Stenton* (5)

(1) 3 B. & C. 353.
(2) B. & P. 67.
(3) 47 L. J. (Q. B.) 766.
(4) 11 Ch. D. 121.
(5) 11 Q. B. D. 518.

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is, as it seems to me, the governing case from which I should take the law to be applied in such a case as the present, and therefore one must see whether there was a debt owing or accruing from the defendant company to Fitzgerald the judgment debtor. It was decided by the Court in *Webb* v. *Stenton* (1) that if the debt be treated as a legal debt it must be a debt existing at the time when the garnishee order seeking to attach it is applied for, that it must be then a debt, though it may be either payable in presenti or in futuro, but that it does not include that which may become a debt hereafter but is not then a debt, that is a legal debt. But I also agree that a debt attachable under a garnishee order may be not only a legal debt but a liquidated sum of money owing in equity, and therefore the question to be considered here is whether on the day mentioned in this issue there was a liquidated sum of money owing by the defendant company to Fitzgerald. Now what are the facts? The company were then indebted under their covenant in the deed of the 22nd of February, 1882, in a liquidated sum or debt payable in presenti to Horton and Fitzgerald jointly, but not to either of them alone. There was no debt due in respect of this sum from Horton to Fitzgerald, nor could there be until the money had been paid to Horton by the company. Therefore the only debt which could be then existing was the debt from the company due under their covenant, and that was a debt to the two and not to Fitzgerald alone. That cannot be said to be either a legal debt or a liquidated sum owing in equity to Fitzgerald, for equity would never have entertained an action for it brought by Fitzgerald alone without making Horton a party. Therefore, applying the rule laid down in *Webb* v. *Stenton* (1) the present case is not brought within it, and this appeal must be allowed.

BOWEN, L.J. I am of the same opinion. Mr. Clarke contended that the issue was not framed to raise the point we are now deciding, but I agree in thinking with the Master of the Rolls that it substantially does so, and that if it does not it ought to be amended. Then was there any debt (including by that word "debt" both a legal and an equitable one) owing or accruing from the defendant company to the judgment debtor which was

(1) 11 Q. B. D. 518.

capable of being attached by a garnishee order? Can it be said that a debt due to two persons jointly is a debt due to one of them? Before the Judicature Acts such a question would, as it seems to me, have been unarguable. Where money is due on a covenant made with two persons jointly by which it is to be paid to such two jointly, no one of those two has any right to that money without the other of them. What difference in this respect can the Judicature Acts have made, for they do not give any right which did not previously exist but only another mode of procedure. It is clear that there was no debt due to the judgment debtor under this deed of February, 1882, when this order to attach was sought for, but only a sum due to him jointly with another, and therefore not a sum capable of being attached.

FRY, L.J. I am of the same opinion; but as the question raised is an important one I will add a few words. Order XLV., r. 2, of the Rules of 1875, under which debts might be attached, requires it to be shewn that some other person "is indebted to the judgment debtor." I adhere to what was said by this Court in *Webb* v. *Stenton* (1) as to the word "indebted" in that rule. Then can it be said that the defendant company was indebted to the judgment debtor when they were indebted to him and another person jointly only? It seems clearly it cannot, and that the words of the rule are not applicable to such a case. If they were, the result would be to enable a judgment creditor to attach a debt due to two persons in order to answer for the debt due to him from the judgment debtor alone, which would be altogether contrary to justice.

I agree that there is nothing in the Judicature Acts to alter the rights of parties. This appeal must be allowed.

BRETT, M.R. I understand that this case was decided at the trial on the authority of *Nash* v. *Pease* (2). All I wish to say about that case is, that if it was rightly decided, it is not, I think, in point.

Appeal allowed.

Solicitor for plaintiff: *W. M. Tilson.*

Solicitors for defendants: *Newman, Stretton & Hilliard.*

(1) 11 Q. B. D. 518. (2) 47 L. J. (Q. B.) 766.

1884
Aug. 7.

THE LONDON LAND COMPANY, LIMITED *v.* HARRIS AND OTHERS.

Practice—Transfer of Action to Chancery Division—Vendor and Purchaser—Action for Return of Deposit—Counter-claim for Specific Performance—Order XLIX., rr. 1, 3.

In an action by purchaser of land against vendor for return of deposit the defendant counter-claimed specific performance :—

Held, that the action ought to be transferred to the Chancery Division.

APPEAL from the decision of Smith, J., at chambers, refusing to transfer the action to the Chancery Division.

The facts were as follows: The plaintiffs had contracted to purchase certain land from the defendants, and, the purchase remaining uncompleted owing to difficulties having arisen by reason of objections taken by the plaintiffs to the title, the plaintiffs brought their action claiming a return of the deposit paid by them to the defendants upon the making of the contract. The defendants, the vendors, counter-claimed specific performance. The defendants applied to the judge at chambers for an order transferring the action to the Chancery Division, which application, as above mentioned, was refused.

S. Leeke, for the defendants, moved by way of appeal. This case is governed by the decisions in *Hillman* v. *Mayhew* (1), and *Holloway* v. *York* (2). The decision in *Storey* v. *Waddle* (3) is distinguishable; there the action was for trespass to one piece of land and the counter-claim for specific performance related to another piece of land. It may be inferred from the language of the judgment that the Court did not think the counter-claim a very substantial one. James, L.J., says, "If such a transfer as this were allowed any defendant might put in a counter-claim for specific performance of some agreement and then apply for a transfer, and thus everything might, at the will of the defendant, be brought into the Chancery Division." The Queen's Bench Division has no machinery for carrying out the usual practice in the case of an action for specific performance. In such an action

(1) 1 Ex. D. 132. (2) 2 Ex. D. 333.
(3) 4 Q. B. D. 289.

there must be, according to the practice, an inquiry at chambers before the chief clerk as to title, and a certificate as to title, and the conveyance would have to be settled at chambers, and might in case of difficulty have to be referred to one of the conveyancing counsel. [He also cited *Holmes* v. *Hervey* (1), and Order XLIX., rules 1, 3.]

Blakesley, for the plaintiffs, shewed cause. In this case the purchasers suing for return of the deposit the vendors counter-claim for specific performance, and claim payment of the price. Such a case does not stand on the same footing as cases where a plaintiff is claiming specific performance in an action. The decision of the question of title will decide both claim and counter-claim. A Court of common law before the Judicature Acts must have decided in court the questions of title between the parties in an action for return of the deposit and it is contended that this Division must do so still. Upon those questions the right to specific performance depends, and when they are decided there is no need of any further machinery. It is not denied that there is a substantial counter-claim in the present case. Nor can it be denied that by the practice of the Chancery Division in the case of a claim for specific performance the order in favour of the party claiming specific performance is subject to an inquiry at chambers as to title, and that the Queen's Bench Division has no machinery for that inquiry. But if the questions of title must be decided in court with regard to the claim, what need is there for further inquiry on the counter-claim?

POLLOCK, B. In this case an action is brought by the purchasers of real property for a return of the deposit. If the claim of the plaintiffs stood alone it would no doubt have to be dealt with by this Division, although it might involve questions of title, because a Court must decide all the issues arising in any case which it has to decide. But the defendants make a counter-claim, not for damages for non-completion only but for specific performance. It is conceded that if the defendants had been first in the field, and had brought their action for specific performance they must have brought it in the Chancery Division. It is further

(1) 25 W. R. 80.

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LONDON LAND CO. v. HARRIS.

conceded that this is a bonâ fide counter-claim. If it appeared that such a counter-claim was not bonâ fide, but inserted merely for the purpose of procuring delay, that might justify the Court in refusing to make the order for the transfer. That is not this case. It is admitted here that there is reasonable ground for suing for specific performance, which, if it had been done before the action for the deposit, could only have been done by action in the Chancery Division. Under these circumstances what is the most convenient and reasonable course to pursue? It is true that if the claim for the deposit had stood alone this Division must have dealt with it, and it would be no ground for a transfer that the Chancery Division is more familiar with the class of questions that will arise; but it is admitted by the counsel for the plaintiffs that by the practice of the Court of Chancery the judgment of the Court in favour of a party claiming specific performance can only amount to this, viz., that all conditions have been fulfilled and all things have been done and happened necessary to entitle him to specific performance, subject, however, to an inquiry into the title. That inquiry this Division has no machinery for making. This renders applicable the cases cited, in which it was held that where the Division in which the proceedings arose has no sufficient machinery for administering the necessary relief there is good ground for making the transfer. I think therefore that there must be an order for the transfer subject to the necessary consents to such transfer being obtained.

LOPES, J. concurred.

Rule absolute accordingly.

Solicitor for plaintiffs: *G. Fletcher Jones.*
Solicitors for defendants: *Mason & Trotter.*

E. L.

DALLOW *v.* GARROLD.
EX PARTE ADAMS.

1884
Aug. 8.

*Solicitor's Lien—Charging Order—*23 & 24 *Vict. c.* 127, *s.* 28—*Garnishee Summons—Priority.*

The proceeds of a fi. fa. issued on behalf of the successful plaintiff in an action were attached in the hands of the sheriff by a garnishee summons from a county court to answer a judgment obtained against the plaintiff in that court. The plaintiff's solicitor in the action, who had received notice of the service of the garnishee summons, subsequently obtained an order under 23 & 24 Vict. c. 127, s. 28, charging the fund recovered with costs of the action remaining due to him:—

Held, that such order was rightly made, and the solicitor's claim was entitled to priority over the claim of the judgment creditor of the plaintiff under the garnishee summons.

APPEAL from an order made by Smith, J., at chambers. The facts were as follows:—

The plaintiff Dallow had recovered in an action against the defendant Garrold the amount of 10*l.* 8*s.* 11*d.*, being the balance by which the sum found to be due to the plaintiff exceeded a counter-claim established by the defendant. The plaintiff's taxed costs of the action amounted to 156*l.* 11*s.* 11*d.*, and the defendant's costs of the counter-claim amounted to 58*l.* 12*s.* 8*d.*, leaving a balance of 97*l.* 19*s.* 3*d.* costs payable by defendant. A fi. fa. having been issued on the 1st of April, 1884, against defendant's goods, a sum of money was on the 7th received by the sheriff thereunder amounting to 111*l.* 16*s.* 2*d.* made up as follows, viz. 10*l.* 8*s.* 11*d.* judgment debt, 97*l.* 19*s.* 3*d.* costs payable to plaintiff, 2*l.* 2*s.* interest, and 1*l.* 6*s.* costs of execution.

On the 8th of April a garnishee summons from the County Court of Hereford was served on the sheriff on behalf of a person named Davies, who had obtained a judgment against the plaintiff Dallow for 8*l.* 8*s.* 10*d.* in that court, attaching all debts due to Dallow to answer that judgment. This summons was returnable on the 27th of May. On the 18th of April the sheriff gave notice to the plaintiff's solicitor of the receipt of the money under the execution and the service of the garnishee summons. On the 3rd of May the sheriff paid to the plaintiff's agents

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101*l.* 7*s.* 3*d.*, retaining 10*l.* 8*s.* 11*d.* out of the proceeds of the execution. On the 14th of May Adams, the plaintiff's solicitor in the action of *Dallow* v. *Garrold*, gave notice to the sheriff of his claim to a charge on the sum retained in respect of 58*l.* 12*s.* 8*d.*, the balance of taxed costs remaining due to him.

On the 27th of May the hearing of the garnishee summons was adjourned till the 24th of June. On the 11th of June an order under 23 & 24 Vict. c. 127, s. 28, was made by Denman, J., on the application of Adams, the plaintiff's solicitor, charging the fund recovered with the costs due to him. On the 24th of June the garnishee summons came on for hearing, but the county court judge on production of the charging order did not make any order thereon, and directed the sheriff to retain the money for twenty-eight days to give time for an application to set aside the charging order. An application was accordingly made to Smith, J., at chambers to set aside the charging order. That learned judge made an order setting aside the charging order on the ground that the claim of the judgment creditor who had served the garnishee summons was entitled to priority over the solicitor's claim for costs.

Hollams moved by way of appeal to set aside the order of Smith, J. This case is really concluded by the decisions in *Faithfull* v. *Ewen* (1) and *Shippey* v. *Grey* (2). It is contended that even independently of the charging order the solicitor's lien for costs on the sum recovered through his instrumentality has priority, and cannot be affected by the garnishee summons any more than by an assignment to a third party. This is not like a question of priority between incumbrancers. The fund is subject to this lien in priority to any interest which may arise or be created in it. The charging order was rightly made and gives precedence to the solicitor's claim over the garnishee summons.

W. E. Hume-Williams, for the judgment creditor Davies, shewed cause. The contention for the other side gives no effect to the provisions of 23 & 24 Vict. c. 127, s. 28. There could be no need of a charging order if the solicitor is entitled to a lien, though the fund is not in his possession. It is contended that the solicitor

(1) 7 Ch. D. 495. (2) 49 L. J. (Q.B.D.) 524.

has no lien upon the proceeds of an execution in the hands of the sheriff until he gets a charging order; that his right to a lien depends on possession, actual or constructive, of the fund, and that if, before he obtains possession or makes any claim to the fund or obtains a charging order, the fund is attached in execution by another, such other is entitled to priority, and the charging order ought not to be made. The decision in *Faithfull* v. *Ewen* (1) depends on the fact that the mortgagees had notice of the rights of the solicitor. In *Shippey* v. *Grey* (2) the judgment creditor had intervened and obtained the garnishee order before the solicitor could tax his costs or take any step. That was not so in the present case. In *Birchall* v. *Pugin* (3) the right of the solicitor was upheld expressly on the ground that he had taken the first step. The money being in the hands of the sheriff, until the solicitor has obtained a charging order, the sheriff holds in trust for the plaintiff. Before the solicitor's lien arises a third party comes and attaches the money in execution. The solicitor's lien cannot override the right of the execution creditor who has attached the fund.

Hollams, in reply.

POLLOCK, B. The first question is, what effect a charging order under 23 & 24 Vict. c. 127, s. 28, is intended to have. It seems to me that the intention must have been to give the solicitor something beyond the lien that existed before in his favour upon funds which might be in his custody, and to enable an order to be made charging any property recovered through his instrumentality. That being so, the question is whether that charging order is to be dealt with as if it was a mere voluntary charge given by the party entitled in favour of another, or whether it is to be looked upon as intended to give the solicitor priority over all persons whatsoever claiming any interest in the fund, so long as the fund remains under the control of the Court. It seems to me that the latter is the effect intended by the Act. It is a question of discretion no doubt whether such an order shall be made. If a solicitor had been guilty of any breach of

(1) 7 Ch. D. 495. (2) 49 L. J. Q. B. D. 524.
(3) Law Rep. 10 C. P. 397.

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faith, or if he had stood by while the fund was dealt with under circumstances which would render it unjust that the interests of others should be postponed to his lien, the Court would have a discretion to refuse the order. But as a general rule it is clearly laid down by the cases that all persons of business when dealing with a fund obtained by litigation must be assumed to be aware that the fund is to be considered as subject to the deduction of the costs to be paid to the solicitor who has conducted the litigation which is successful. I should say for myself that it is always right to make the order in favour of such solicitor unless he has been guilty of some mala fides, or has stood by while the fund was being dealt with so as unfairly to prejudice the position of others. There does not seem to me to be anything of that sort here. I think therefore that the charging order was very properly made, and that the solicitor's claim for costs ought to have priority over that of the judgment creditor under the garnishee summons. The order made at chambers will therefore be set aside.

LOPES, J. I agree. I have nothing to add except that the case seems to me to be governed by *Faithfull* v. *Ewen* (1).

Appeal allowed.

Solicitors for applicant: *Roberts & Barlow.*
Solicitors for judgment creditor: *Matthews & Garrold.*

(1) 7 Ch. D. 495.

E. L.

[IN THE COURT OF APPEAL.]

1884
Aug. 8.

SANDERSON *v.* THE MAYOR, &c., OF BERWICK-UPON-TWEED.

Landlord and Tenant—Covenant for quiet Enjoyment.

In order to constitute a breach of covenant for quiet enjoyment in a lease of land, it is sufficient that the lessee's ordinary and lawful enjoyment of the demised land be substantially interfered with by the acts of the lessor or those lawfully claiming under him, although neither the title to the land nor the possession of the land be otherwise affected.

By a general system of drainage made by the defendants in a particular district, various farms in that district were drained by several underground drains, by which the water was carried through all such farms. The defendants let one of these farms to the plaintiff with the usual covenant for quiet enjoyment against the acts of the lessors or any person lawfully claiming through or under them. The defendants had previously let another of such farms adjoining, but lying above the plaintiff's farm, to one C., with a right to use the drains through the plaintiff's land, so far as they were adequate to carry the water from C.'s farm. C. during the plaintiff's tenancy, first, by an excessive user of the drainage system, which was properly constructed for the purpose of drainage, caused the water passing down the drains in his farm to escape and overflow into the plaintiff's farm and damage his crops. Secondly, by a proper user by C. of the drains passing through the plaintiff's farm, damage was also done to a field in plaintiff's farm by the escape of water, but this arose from one of the drains there having been imperfectly and improperly constructed:—

Held, that the defendants were liable to the plaintiff for a breach of their covenant for quiet enjoyment in respect of this last damage, as there had been within the meaning of such covenant a substantial interruption by a person who lawfully claimed through the defendants. But that the defendants were not liable for the damage done by the excessive user by C. of the drainage system, which was properly constructed, either under their covenant for quiet enjoyment or under the law of trespass or nuisance.

APPEAL by the defendants from the judgment of Denman, J., given without a jury, at Newcastle-upon-Tyne, in favour of the plaintiff.

The facts must be taken to be as stated in the following judgment of the Court. The case was argued on the 1st and 3rd of July last by

Sir F. Herschell, S.G., and *T. W. Chitty* (*Lockwood, Q.C.*, with them), for the defendants.

A. Wills, Q.C., and *G. Bruce, Q.C.*, for the plaintiff.

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SANDERSON v. MAYOR OF BERWICK ON TWEED.

The following cases were referred to:—*Pyer* v. *Carter* (1); *Suffield* v. *Brown* (2); *Watts* v. *Kelson* (3); *Alston* v. *Grant* (4); *Wheeldon* v. *Burrows* (5); *Ewart* v. *Cochrane* (6); *The King* v. *Pedley* (7); *Rylands* v. *Fletcher* (8); *Anderson* v. *Oppenheimer* (9); *Richards* v. *Rose* (10); *Bell* v. *Twentyman* (11); and *Lord Egremont* v. *Pulman.* (12)

Sir F. Herschell, S.G., replied.

Cur. adv. vult.

Aug. 8. The judgment of the Court (Brett, M.R., and Bowen and Fry, L.JJ.), was delivered by

FRY, L.J. In this case there has been some difficulty in ascertaining the facts necessary for the determination of the questions raised; but we think that from the statements of counsel and the findings of the referee the following narrative may be taken as the basis for decision.

In the year 1845 a moorland district within the borough of Berwick was inclosed, and a system of drainage formed, the general scheme of which consisted in the construction of long lines of underground drains, converging as they passed from the higher to the lower ground, which were fed by transverse and nearly parallel lines of field drains. There appears to have been one general scheme, which embraced several farms belonging to the defendants, including the plaintiff's farm, and a farm lying above the plaintiff's farm and adjoining it.

Three of the long lines of drain coming from the land above the plaintiff's farm met first inside the upper boundary of that farm in a field marked O on the map which has been used in this case, and from thence the water was carried in a larger drain through the remainder of the plaintiff's farm.

In 1865 the defendants demised to one Alexander Cairns the

(1) 1 H. & N. 916; 26 L. J. (Ex.) 258.
(2) 4 De G. & S. 185; 33 L. J. (Ch.) 249.
(3) Law Rep. 6 Ch. 166.
(4) 3 E. & B. 128.
(5) 12 Ch. D. 31.
(6) 4 Macq. 117.
(7) 1 A. & E. 822.
(8) Law Rep. 3 H. L. 330.
(9) 5 Q. B. D. 602.
(10) 9 Exch. 218.
(11) 1 Q. B. 766.
(12) Mood. & M. 404.

farm lying above the plaintiff's farm, the general words of the demise including the words "waters and watercourses."

In 1870 the plaintiff entered into the occupation of the farm in respect of which he is now suing, and in 1875 the defendants executed to him a lease of the farm, creating a term as from the year 1870. This lease reserved to the defendants a right to enter upon the demised premises, and view and repair, or make anew, the watercourses which then were or should at any time during the term be carried through the lands, and to make such alterations therein as they should think necessary, and it also contained a covenant on the part of the lessors that it should be lawful for the plaintiff peaceably and quietly to hold, possess, and enjoy the demised premises during the term, without any eviction, interruption, or denial from or by the lessors, or any person lawfully claiming through or under them. It further contained a covenant by the lessors to drain such portions of the demised land in such manner and at such times as they might deem necessary.

At some time prior to the year 1880 some of the water passing down the drains in Cairns' farm escaped at a spot within that farm and near the borders of the plaintiff's, and more or less filled or saturated a depressed area which has been indicated by the referee on the plan referred to him by a contour line of 220.85 above a datum line, this area lying principally within the boundary of Cairns' farm, but extending also into the plaintiff's farm. From the plaintiff's counsel we understand the point of escape or overflow to have been near where the settling well is marked on the plan, and the lie of the land makes this very probable, as it is apparently the lowest spot of the depressed area. The plaintiff's land and crops were injured within so much of this depressed area as lies within the plaintiff's farm. In order apparently to correct this result the defendants in 1880 sank the settling well in the lowest spot of the depressed area, and carried a new drain from it in a circuit so as to join the long drains lower down on the plaintiff's farm, and thus relieve the drains through the upper part of his farm. Since the construction of this new drain in 1880 no damage has, according to the statement of the plaintiff's counsel arisen in the field O.

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The fact of this improvement having been made by the defendants in 1880 may suggest to the mind that the original construction of the drainage system in Cairns' land was defective; but no such point has been raised on the pleadings or by the questions addressed to the referee, and we cannot, therefore, as against the defendants, conclude that there was any such defect but must hold that the overflow was or might have been caused by an excessive user on the part of Cairns of a system properly constructed for the purpose intended. If the system was inadequate for the needs of the farm Cairns should either have done the additional works himself, or have required his landlords, the defendants, to do them.

Lower down in the plaintiff's farm than the field O is another field, marked Q, through which was constructed a tile drain conduit, part of the long lines of drainage. This drain was imperfectly made, and has allowed the water to escape between the joints, and has so done damage to a portion of the field Q.

The questions for decision are: 1. Has the plaintiff any cause of action in respect of the damage done by the water to the plaintiff's land at O? and 2. has the plaintiff any cause of action in respect of the damage in the field Q?

The lease to Cairns in 1865 appears to us to have conferred on him a right to use the drains through the plaintiff's land for the purpose of carrying away from his land so much water as they were adequate to carry, but not to have conferred any right to use the drains in his own land for the purpose of causing on his own land an accumulation of water which should overflow on to the adjoining lands of the plaintiff. It would be giving a very strained and violent effect to the words "waters and watercourses" in the lease of 1865 if we held that they were an authority to the lessee thus to injure at once his neighbour and the soil of the demised farm by an accumulation of water.

With regard, therefore, to the damage done to the field O, it appears to us that the defendants are not liable on the ground of causing or permitting the injury, for Cairns and not they caused or permitted it. They are not liable on the ground that it is a disturbance by a person lawfully claiming under them, because the lease gave Cairns no lawful claim to do the act complained

of. They are not liable on the ground that they demised to Cairns a thing dangerous or injurious to the plaintiff, even assuming such ground to be sufficient, for the drainage system is not found to have been improperly constructed, and it was injurious only when used to carry off more water than it could carry away, and unless on one or other of these three grounds we do not see that the defendants can be liable, whether under their covenant for quiet enjoyment or under the law of trespass or nuisance.

In our opinion, therefore, the defendants are not liable for the damage done to field O.

As regards the damage in the field Q different considerations apply, because the damage here has resulted to the plaintiff from the proper user by Cairns of the drains passing through the plaintiff's land which were improperly constructed. In respect of this proper user Cairns appears to us to claim lawfully under the defendants by virtue of his lease, and to have acted under the authority conferred on him by the defendants. The injury caused to the field appears to us to have been, within the meaning of the covenant in that behalf contained in the lease to the plaintiff, a substantial interruption by Cairns, who is a person lawfully claiming through the defendants, of the plaintiff's enjoyment of the land, and so to constitute a breach of the covenant for quiet enjoyment for which the defendants are liable in damages.

In coming to this conclusion we have not lost sight of the observations on the nature of such a covenant which were made by Willes, J., in *Dennett* v. *Atherton*. (1) But it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected.

The judgment of the learned judge must, therefore, be varied, and in lieu of the directions he gave, there must be a direction to

(1) Law Rep. 7 Q. B. 316, at pp. 326, 327.

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the referee to inquire what damage the plaintiff has suffered from the injury done to the field Q by the water escaping from the drain. As the appeal has been partially successful and has partially failed, there will be no costs of this appeal.

Judgment varied.

Solicitor for plaintiff: *T. W. Rossiter, for Hoyle, Shipley, & Hoyle, Newcastle-upon-Tyne.*

Solicitor for defendants: *E. Bromley, for R. Douglas, Berwick-upon-Tweed.*

W. P.

Aug. 12.

EX PARTE MAY. IN RE MAY.

Bankruptcy—Administration in Bankruptcy of Insolvent Estate—Transfer of Administration Proceedings from High Court to County Court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-ss.* 1, 2, 3, 4, 5—*Bankruptcy Forms*, 1883, *Nos.* 11, 31, 32.

When proceedings for the administration of a deceased debtor's estate have been commenced in the Chancery Division of the High Court, and an order has been made, under sub-s. 4 of s. 125 of the Bankruptcy Act, 1883, for the transfer of the proceedings to the Court exercising jurisdiction in bankruptcy, that Court may make an administration order on an ex parte application by a creditor, but the order cannot be made until the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the legal personal representative, or unless it is proved that the debtor committed an act of bankruptcy within three months prior to his decease.

APPEAL from the Macclesfield County Court.

John Aubyn May died on the 24th of May, 1884, intestate. He had for the six months next preceding his death resided and carried on business at Congleton, within the bankruptcy district of the Macclesfield County Court. On the 12th of June, 1884, letters of administration to the estate of the intestate were granted to his widow, and on the same day a creditor named Peake commenced an action in the Chancery Division of the High Court against the administratrix for the administration of the estate. On the 4th of July, 1884, upon the application of the Manchester and Liverpool District Banking Company, who were creditors of the intestate, an order was made by Kay, J., at

Chambers, that the action of *Peake* v. *May* should be transferred, in accordance with the provisions of s. 125 of the Bankruptcy Act, 1883, to the Macclesfield County Court. This order purported to be made "upon hearing the solicitors for the applicants, and for the plaintiff and defendant, and upon reading (inter alia) the joint affidavit of C. W. Rippon and E. W. Hollinshead." Rippon was one of the managers of the banking company, and he deposed that the company were unsecured creditors of the intestate at the time of his death for a sum exceeding 50*l.* Hollinshead was a member of the firm who were solicitors for the banking company. From his evidence it appeared that on the 9th of May his firm received a letter from the solicitors to the administratrix which stated that the assets of the intestate would be insufficient to pay all his liabilities in full, and invited them to attend a private meeting of the creditors which had been summoned by the administratrix for the 13th of June. The deponent attended the meeting on that day, and the solicitor of the administratrix, on her behalf, then informed the meeting that the intestate's estate was insolvent, and read a statement which shewed that his debts amounted to 5368*l.* and his assets to 1690*l.*

On the 18th of July, 1884, upon an ex parte application by the banking company, the registrar of the county court made an order that the estate of the intestate should be administered according to the law of bankruptcy, pursuant to s. 125 of the Act, and appointed the official receiver of the court to be the trustee of the property of the intestate.

The administratrix appealed.

July 20. *Cooper Willis, Q.C.*, and *Tyssen*, for the appellant. The order for administration is bad on two grounds—First, Because it was made within two months (1) from the date of the

(1) Sect. 125 of the Bankruptcy Act, 1883, provides:—

"(1.) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy.

"(2.) Upon the prescribed notice being given to the legal personal representative of the deceased debtor, the Court may, in the prescribed manner, upon proof of the petitioner's debt,

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grant of the letters of administration. Secondly, Because it was made ex parte. As to the first objection, the two months mentioned in s. 125, sub-s. 3 had not expired when the order was

unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may upon cause shewn dismiss such petition with or without costs.

"(3.) An order of administration under this section shall not be made until the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the legal personal representative of the deceased debtor, or unless the petitioner proves to the satisfaction of the Court that the debtor committed an act of bankruptcy within three months prior to his decease.

"(4.) A petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of justice for the administration of the deceased debtor's estate, but that Court may in such case, on the application of any creditor, and on proof that the estate is insufficient to pay its debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and thereupon such last-mentioned Court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor.

"(5.) Upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the court, as trustee thereof, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act.

"(10.) Unless the context otherwise requires, "Court" in this section means the Court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his decease; "creditor" means one or more creditors qualified to present a bankruptcy petition, as in this Act provided.

"(11.) General rules for carrying into effect the provisions of this section may be made in the same manner and to the like effect and extent as in bankruptcy."

Sect. 6 by sub-s. 1 (*a*) provides that the debt owing to a petitioning creditor or creditors in bankruptcy must amount to 50*l*.

Sect. 168 provides by sub-s. 1 that "In this Act, unless the context otherwise requires (inter alia), 'general rules' includes forms; 'prescribed' means prescribed by general rules within the meaning of this Act."

Rule 200 of the Bankruptcy Rules, 1883, provides that "A creditor's petition under s. 125 of the Act shall be in the Form No. 11 in the Appendix, with such variations as circumstances may require, and shall be verified by affidavit."

Rule 201. "(1.) The petition shall, unless the Court otherwise directs, be served on each executor who has proved the will, or, as the case may be, on each person who has taken out letters of administration. The Court may also, if it thinks fit, order the

made, and the administratrix did not consent to the order. It is not suggested that the intestate committed any act of bankruptcy within three months prior to his decease. The limit of two months contained in sub-s. 3 applies as much to the making of an administration order after a transfer of proceedings under sub-s. 4, as it does to the making of an administration order on the petition of a creditor under sub-s. 2. This is the reasonable and natural interpretation of the words of sub-s. 3, "an order of administration *under this section* shall not be made until the expiration of two months, &c." The intention is that the personal representative shall have a reasonable time for making a settlement with the creditors.

As to the second objection, the intention is that the administration order should be made after hearing the executor or administrator. Rule 201 provides that a creditor's petition under s. 125 shall be served on the executor or administrator, but there

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petition to be served on any other person." "(2.) Service shall be proved in the same way as is provided in the case of an ordinary creditor's petition, and the petition shall be heard in the like manner."

Rule 202: "An administration order under s. 125 shall be in the Form No. 31 in the Appendix, with such variations as circumstances may require."

The form of petition (No. 11) contains (inter alia) a statement that the deceased debtor for the greater part of the six months preceding his decease resided or carried on business within the district of the Court to which the petition is presented; a statement of the amount of the debt due to the petitioner or petitioners; a statement that the deceased within three months next before his decease committed a specified act (or specified acts) of bankruptcy: a statement of the date of the probate of the will of (or the grant of letters of administration to) the deceased, and (if necessary) that his executor or administrator consents to the petition; and a statement that the estate of the deceased is insufficient to pay his debts.

The form of order of administration (No. 31) recites the petition and the evidence, and orders that the estate of the deceased "who died insolvent, be administered in bankruptcy, and that the official receiver of this Court be the trustee."

Form (No. 32) of order "for administration of estate of deceased debtor on transfer of proceedings under s. 125 (4)," contains a recital of the commencement of proceedings in another Court and of the order for transfer, and orders that the estate of the deceased "shall be administered according to the law of bankruptcy pursuant to s. 125 of the Act," and that the official receiver of the Court be the trustee of the property of the deceased.

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is no express provision in the rules as to the service of an application for an administration order after a transfer of proceedings under s. 125, sub-s. 4. Consequently, the general provisions of Rules 19 and 20 apply. (1) A final order ought not to be obtained ex parte. This is an abuse of the proceedings of the court. The effect and operation of an order under sub-s. 4 is precisely the same as that of an order under sub-s. 2.

Winslow, Q.C., and *R. Vaughan Williams*, for the bank. The object of the provisions of s. 125 is that whenever an estate is manifestly insolvent, it shall be administered in the Court of Bankruptcy. Two modes of procedure are provided. Under sub-ss. 1 and 2 the Court is to make an administration order on the petition of a creditor, unless there is a reasonable probability of the solvency of the estate. Then, under sub-s. 4, a petition is not to be presented. During the two months after the grant of probate or letters of administration, steps may have been taken for an administration of the estate in that which, but for s. 125, would have been the proper court for the purpose, and the creditors are, therefore, debarred from petitioning the Court of Bankruptcy, but any creditor may apply to the Court in which the proceedings have been commenced for a transfer of the proceedings to the Court of Bankruptcy, and that Court, before making an order for transfer, must be satisfied of the very same thing of which the Court of Bankruptcy would have to be satisfied before it could make an administration order under subs. 2, i.e. of the insolvency of the estate. In the present case it was proved to Kay, J., in the presence of the administratrix, that the estate was insolvent, and upon that evidence he came to

(1) Rule 19: "Every application to the Court (unless otherwise provided by these rules, or the Court shall in any particular case otherwise permit) shall be made by motion supported by affidavit."

Rule 20: "When any party other than the applicant is affected by the motion, no order shall be made unless upon the consent of such party duly shewn to the Court, or upon proof that notice of the intended motion and a copy of the affidavits in support thereof have been duly served upon such party: provided that the Court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail serious mischief, may make any order ex parte upon such terms as to costs and otherwise, and subject to such undertaking, if any, as the Court may think just; and any party affected by such order may move to set it aside."

the conclusion that it ought to be administered in the Court of Bankruptcy. There has been no appeal from his order. What is the effect of such an order? No power is given to the county court to continue the proceedings in the administration action, they are simply suspended by the order for transfer, and the executor or administrator is left to do what he pleases with the estate. That is the reason why the Court of Bankruptcy is "thereupon" to make an administration order. There is no reason why it should try over again the question which has been already tried by the Court which made the order for transfer. That Court has exercised a judicial discretion, and the order of the county court is purely ministerial. The difference between the Forms No. 31 and 32 shews that this is the construction which was put on s. 125 by the framer of the rules and forms. Rules 19 and 20 do not apply, because by Form 32 it is in effect "otherwise provided."

As to the provisions of sub-s. 3, it says: "unless the *petitioner* proves that the debtor committed an act of bankruptcy within three months prior to his decease." It evidently refers to proceedings by petition, and the proceedings under sub-s. 4 are not by petition. Sub-s. 3 ought to be read, "An order of administration *upon a petition* under this section shall not be made until the expiration of two months, &c." Sub-s. 3 does not apply to an administration order made under sub-s. 4. Under that section the estate is not protected, as it is under sub-s. 2, by the relation back of the title of the trustee to the date of the presentation of the petition.

Cooper Willis, Q.C., in reply. If it had been intended that sub-s. 3 should apply only to an administration order made upon a petition, this would have been expressly stated; the words ought to be construed according to their literal and natural meaning, and so construed they apply to any administration order. If it had been intended that the question should be decided by the Court which makes the order of transfer, sub-s. 4 would have provided that that Court should first make an administration order, and then make an order to transfer the proceedings. The Court has a discretion as to making an adminis-

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tration order; why should the word "thereupon" in sub-s. 4 be construed "immediately," or the word "may" be construed "shall"? If the Court has, after the transfer, no discretion as to making an administration order, why is any application by a creditor necessary? Even in the High Court an administration judgment is not now a matter of course.

Cur. adv. vult.

Aug. 12. The judgment of the Court (Hawkins and Wills, JJ.), was delivered by

Wills, J. This is an application on behalf of the administratrix of J. A. May, that an administration order, made under s. 125 of the Bankruptcy Act, 1883, in virtue whereof the property of the intestate vests in the official receiver, instead of remaining in the administratrix, may be rescinded, on the grounds, first, that the registrar had no power to make such an order before the expiration of two months from the date of the grant of letters of administration; secondly, that the order was made ex parte. [The learned judge stated the facts, and referred to the provisions of s. 125, and continued:—] It will be convenient to consider first the second objection, viz., that the order under appeal was made ex parte. Under s. 125 an "order for administration" may be made by the Court (i.e., the Court exercising jurisdiction in bankruptcy), within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his death (ss. 168, 125, sub-s. 10), under two sets of circumstances: first, in a case in which no proceedings have been previously instituted for the administration of the estate of the debtor, and then a creditor duly qualified may, upon mere proof of a debt of sufficient amount, obtain an "order for the administration in bankruptcy of the deceased debtor's estate," the onus of proving that the estate may be expected to be solvent, and that interference with the ordinary course of administration is, therefore, unnecessary, being thrown upon the executor or administrator (see rule 201 and form 11). One further condition is imposed by sub-s. 3, viz., that, if the order be made

within two months of the death of the intestate, there must be either the consent of the executor or administrator, or proof that an act of bankruptcy was committed by the debtor within three months prior to his decease. After the lapse of that period mere proof of the debt, when the executor or administrator fails to satisfy the Court of the solvency of the estate, is sufficient to support the order. Secondly, the estate may be already in course of administration by legal process. In such a case, by virtue of sub-s. 4, the court in which the administration action is pending may, on the application of a creditor, and on proof of the insolvency of the estate, transfer the proceedings to the proper court for the exercise of bankruptcy jurisdiction, and, when that court is, under these circumstances, once seised of the case, it may "in the prescribed manner make an order for the administration of the estate of the deceased debtor," which is to have the like consequences with an administration order made under sub-ss. 1 and 2 on a creditor's petition, which is a synonym for saying that the order shall be for administration according to the law of bankruptcy.

The form of the order to be made under sub-s. 2 is given in the Appendix of Forms under No. 31. It directs that the estate "be administered in bankruptcy." The order to be made under sub-s. 4, No. 32, directs that the estate "be administered according to the law of bankruptcy pursuant to s. 125." We think it impossible to draw any kind of distinction between the two as to their meaning or legal operation, and that each is an "order for the administration of the estate of the deceased debtor," or "an order for administration under this section," according to the varying phraseology of different portions of s. 125. The order is the same, and is made by the same Court in each case. It is only the machinery for obtaining it which differs. In the one case it is obtained upon petition, in the other without a petition. Sect. 125 starts with the provisions applicable to proceedings by way of petition, and empowers the Court, unless satisfied of the solvency of the estate, to grant the administration order upon mere proof of the petitioner's debt, a view which is supported by form 11, which is the form of a petition under s. 125, and which (omitting

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a paragraph intended only for use in case the application be made within two months of the date of the grant of probate or letters of administration) indicates proof of nothing except the place of residence of the debtor, and the petitioning creditor's debt.

Now, under sub-s. 4, before the transfer from the court in which the administration suit is pending to the court exercising bankruptcy jurisdiction can be had, it is necessary for the applicant to be duly qualified (sub-s. 10) which implies that he must prove that fact, and he must prove that the estate is insolvent. He must, therefore, prove more, and not less, than the petitioner under sub-s. 1 before he can get the order of transfer. He must summon the executor or administrator before he can obtain the order, and before, therefore, the transfer is made, the executor or administrator must have been heard, or at least must have had the opportunity of being heard, to contest the very points, and the only points, which would be in controversy upon a creditor's petition, the only difference being one in his favour, viz., that in order to obtain the transfer the creditor must accept the onus of proving that the estate is insolvent, instead of merely leaving the executor or administrator to prove to the Court, if he can, that the estate is solvent. Under these circumstances it seems preposterous to suppose that it can be necessary to have the same matters brought into controversy a second time in the court to which the transfer has been effected before the administration order can be made. They have been already the subjects of adjudication by a competent Court, and the party concerned in denying them has already been heard upon them. We, therefore, see no reason why the order should not be made ex parte.

The other objection, however, that the order was made within two months of the date of the letters of administration, appears to us to be fatal. The same considerations which have led us to the conclusion that there is no distinction between the order for administration under sub-s. 2 and that under sub-s. 4, make it impossible to draw a distinction between them as to the application of sub-s. 3. Whether the latter portion of that sub-s., which provides for proof *by the petitioner* of an act of bankruptcy having

been committed by the debtor within three months prior to his decease, be capable of being satisfied in the case of proceedings under sub-s. 4, may be open to discussion. There is no doubt, however, that the earlier portion, which relates to the concurrence of the executor or administrator, is equally applicable in both cases, and there is, therefore, no inherent difficulty in giving their plain, natural, and unmistakable meaning to the words of sub-s. 3, which says in terms that no such order as has been made in the present case shall be made until the expiration of two months from the date of the grant of administration.

The appeal must, therefore, succeed, and the order of the 18th of July must be set aside, and the appellant must have her costs.

Leave was given to appeal to the Court of Appeal.

Solicitor for appellant: *H. T. Raw, for Llewellyn & Ackrill, Tunstall.*

Solicitors for respondents: *Robinson, Preston, & Stow, for Hollingshead & Moody, Tunstall.*

W. L. C.

1884
April 8.

BELLAIRS *v.* TUCKER AND OTHERS.

Public Company—Prospectus—False and fraudulent Statements.

The plaintiff was a dealer in stocks and shares, and had formerly been a member of the Stock Exchange. The defendants were largely interested as shareholders in the Date-Coffee Company, a company whose objects were declared to be (amongst others) the acquisition of licenses to use an invention for manufacturing from dates a substitute for coffee, for which a patent had been granted to Henley (one of the defendants), and to sell, &c., the patent-rights when acquired by the company. Of this company Haymen (another of the defendants) was chairman, the defendant Tucker was the solicitor, and Henley consulting engineer.

Henley was also possessed of a patent for the manufacture and sale of date-coffee in France; and a company was formed for that purpose, called The French Date-Coffee Company, with a capital of 100,000*l.* in 100,000 shares of 1*l.* each (under substantially the same management as that of the English company), by whom Henley's patent for France was purchased for 50,000*l.*, which sum it was agreed should be divided as a bonus amongst the shareholders in the English company. Early in February, 1881, the defendants prepared and issued a prospectus of the French company, containing the following passage,—"From the success attending the company formed for the working of Henley's English patent, when a duty of 2*d.* per lb. is payable, and the coffee sold at 1*s.* per lb., the directors feel justified in stating they confidently believe the profits of this company will be more than sufficient to pay dividends of at least 50 per cent. on the nominal capital, and will exceed those of the company working the English patent, which, having only been formed a little over twelve months, has entered into a contract which will yield the return by way of annual dividends of a sum equal to the whole paid-up capital of the company of 34,000*l.*"

At the time at which this prospectus was issued the period had not arrived at which "profits" in a commercial sense could have been acquired by the English company: but the article had been sold in the English market and received with some favor, and an agreement had been entered into by the company with a merchant or broker in London to take all they could make.

The plaintiff, influenced, as he said, partly by the above statement in the prospectus, partly from information derived from another source, and partly by the favorable opinion he had formed of the article to be manufactured, purchased 100 shares in the French company, and paid the deposit. He had no connection with the English company. Owing, as it was said, to the duty imposed upon the date-coffee in England, and to other circumstances, the hopes held out in the prospectus were not realised, and the French Date-Coffee Company was ultimately wound up: and, after the lapse of nearly two years, when the plaintiff was called upon as a contributory, he sought to recover from the defendants the sum he had paid as deposit money and the amount of calls for which he had become and would become liable, as damages for the alleged

false and deceitful representations contained in the above statements in the prospectus:—

Held, that the statements complained of, though expressing the strongest confidence that the company referred to would be successful and would make large profits by the sale of the article to be manufactured, could not fairly be read as alleging that profits in a commercial sense had actually been made, and consequently that there was no evidence which could be properly left to a jury in support of the charge of wilful and fraudulent misrepresentation.

THIS was an action brought by the plaintiff to recover damages from the defendants, the promoters of a company called "The French Date-Coffee Company, Limited," by reason of his having been induced by the alleged false and fraudulent statements in a prospectus framed and issued by the defendants to buy shares in the company, which shares proved to be worthless, and upon which he had been compelled to pay or had become liable to pay calls as a contributory upon the winding up of the company.

The material statements in the prospectus, and all the facts, as well as the arguments of counsel upon a motion to enter judgment for the defendants upon certain findings of the jury at the trial before Lopes, J., at the last Hilary sittings, are fully set out in the judgment of Denman, J.

The case was argued before Denman and Manisty, JJ., on the 28th and 29th of February and the 1st and 5th of March, 1884, by

C. Russell, Q.C., and *Channell*, for the plaintiff.

Pollard, for the defendant Tucker.

Sir H. Giffard, Q.C., *Waddy, Q.C.*, and *Seward Brice*, for the defendant Haymen, and

M'Millan and *Lionel Hart*, for the defendant Henley.

Cur. adv. vult,

April 8, 1884. DENMAN, J. This was an action brought to recover by way of damages a sum of 95*l.* which the plaintiff had been compelled to pay or became liable to pay in respect of shares held by him in a company called "The French Date-Coffee Company, Limited."

The jury, in answer to questions put to them by the learned

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judge at the trial, found,—1. That the defendants were responsible for the issuing and contents of the prospectus of the company,—2. That the statements in it relied upon by the plaintiff were false,—3. That the defendants knew them to be false, or were ignorant whether they were true or false, and made them recklessly,—4. That the plaintiff was misled by these false statements or some of them, and induced or materially influenced by them to part with his money.

Upon these findings the learned judge gave judgment for the plaintiff, against all the defendants, for 95*l.* and costs. The defendants in due course gave separate notices of motion to enter judgment for them, or for a new trial on the grounds of misdirection and that the verdict was against the evidence.

It will be observed that the sole ground upon which the verdict was given was the falsehood of statements in the prospectus of the company: and the only statements which were put to the jury by the learned judge were those alleged to be contained in the following paragraph of the prospectus, which was set out verbatim in par. 11 of the statement of claim,—"From the success attending the company formed for the working of Henley's English patent, when a duty of 2*d.* per lb. is payable, and the coffee sold at 1*s.* per lb., the directors feel justified in stating they confidently believe the profits of this company will be more than sufficient to pay dividends of at least 50 per cent. on the nominal capital, and will exceed those of the company working the English patent, which, having only been formed a little over twelve months, has entered into a contract which will yield the return by way of annual dividends of a sum equal to the whole paid-up capital of the company of 34,000*l.*"

The question, therefore, with which we have to deal is the truth or falsehood of the above paragraph, and its effect with reference to the plaintiff himself and to all or any of the defendants.

As regards the first question left to the jury, it was not denied, but on the contrary admitted, that the defendant Haymen was responsible for the prospectus. As regards the other two defendants, this was contested: and it was contended on behalf of all three defendants, that, even if the publication of the prospectus was

their act, there was no liability in this action, and that the verdict was against the evidence upon the second, third, and fourth questions left to the jury.

The facts, so far as they were material and not in dispute, were as follows:—The plaintiff was a dealer in stocks and shares, who had formerly been on the Stock Exchange. The defendant Haymen was chairman of a company called "The Date-Coffee Company, Limited." The defendant Tucker was solicitor, and the defendant Henley consulting engineer to the same company. That was a company registered on the 19th of December, 1879, with a capital of 50,000*l.* in shares of 5*l.* each; and its objects, as set forth in the memorandum of association, were, amongst other things,—"1. To acquire and purchase or take licenses for and use, &c., certain inventions for manufacturing from dates a substitute for coffee, for which a patent *had* been granted to the defendant Henley,—2. The same as to the patents which *would be* granted to him,—3. To adopt and carry out an agreement of the 5th of December, 1879, between the defendants and the secretary of the company on behalf of the company,—9. To sell, &c., the patent rights, &c., of the company,—12. To form or assist in forming or developing any limited company, whether such company should have the same or cognate objects as the company or not, and to subscribe to or advance and lend money to or for such company or the expenses of the formation thereof."

The company, which for convenience I will call The English Company, proceeded to issue shares and to make arrangements for the sale of the material which it was to manufacture. The three defendants appear to have attended regularly at all the board meetings; Henley having been elected a director soon after the formation of the company.

This first general meeting of the company was held on the 8th of March, 1880, when a resolution was passed authorizing the directors at once to purchase the royalty from the defendant Henley for 30,000*l.* This was done, and Henley was paid within a few months of that date; and all the three defendants, by arrangement among themselves, became jointly interested each to the extent of one third in the money so paid.

In June, 1880, one Mare was sent out to Kurrachee, in India,

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there to superintend the manufacture of dates into powder which was to be mixed with coffee in order to produce the date-coffee. He arrived there on the 25th of August, 1880, and from that time was in constant correspondence with the English company through Haymen and the secretary as to the quantity of material which it would be possible to manufacture, and as to the quantity of ovens and other apparatus required. He was called as a witness for the plaintiff, and stated that during the first twelve months, having only two ovens to work with, he sent over ten tons of date-powder per month, which was as much as the machinery would produce; that, in September, 1881, having six ovens, the largest amount he turned out was thirty-five tons in a month; and that the largest amount he could have turned out in a month was forty tons, or 480 tons a year. It appears, however, from several of Mare's letters which were read at the trial that he was on some occasions speaking of the possibility of producing at a greater rate; for instance, in a letter of the 6th of October, 1880, at a time when he had only *two* ovens, he writes,—"If I only turn out *five* tons of coffee per *week* to commence with, I shall only have enough for a month's work." In a subsequent letter of the 1st of December, he speaks of the impossibility of producing 13.33 tons per week with two ovens; and in one of the 22nd of December, he says that, with the present (i.e. two) ovens, he does not think he shall ever turn out a ton a day. Other letters were referred to as to the quantity expected to be turned out at Kurrachee: but Mare does not appear at any time to have contemplated the possibility of turning out more than twenty tons weekly even with six ovens, which was the largest number ordered or apparently contemplated; at all events until a period long subsequent to the statements in the prospectus relied upon by the plaintiff.

On the other hand, it appears from letters sent to Mare that the directors were insisting upon the production of at the rate of forty tons a week as soon as four more ovens should be supplied; and in fact four more were sent out in April, 1881, two of which were ordered as early as the 14th of January, 1881; and the directors were undoubtedly in active correspondence with Mare at and subsequently to the date of the prospectus complained of

as to the best mode of carrying on the manufacture at Kurrachee on a large scale.

In order to make a profit of 34,000*l.* a year, it would be necessary that about thirty tons a week should be manufactured. The quantity actually sold by the company, so far as it was proved at the trial was, in January, 1881, 1 ton 8 cwt.; February, 27 tons 7 cwt.; March, 32 tons 11 cwt.; April, 19 tons 14 cwt.; May, 13 tons 1 cwt.; June, 9 tons 18 cwt.; August, 10 tons; September, 17 tons; October, 20 tons.

At the time of the publication of the prospectus of which the plaintiff complains, a few tons only of the date-powder manufactured at Kurrachee had reached England, and two cargoes were on the way; but the shares of the English company had been sold at a very considerable premium; 5*l.* shares (1) having been sold for as much as 16*l.* or 17*l.*

The facts relating to the alleged contract mentioned in the prospectus of the French company were as follows:—A Mr. Young, a colonial merchant in Mark Lane, was acquainted with the defendant Tucker. In December, 1880, Tucker proposed that he should take the sole agency of the date-coffee made by the English company; and on the 22nd of December he (Young) wrote a letter offering to take the whole of the company's make. This letter was laid before a board meeting of that date, at which the three defendants were present; and an answer was then ordered to be sent, to the effect that the board did not feel justified in accepting this offer without the sanction of the shareholders, and that a general meeting would be held for that purpose on the 31st of January. This was soon after the first sale of date-coffee which had arrived from Kurrachee. Negotiations then commenced between Mr. Young's solicitor and the defendant Tucker on behalf of the company, in the course of which Young's solicitor suggested that the quantity to be taken by Young should be limited to such as he might order; but eventually the contract was signed on the 12th of February, binding Young to take the whole. Though Tucker informed Young's solicitor that he had arranged with Young that the company were not to "inundate" Young with the date-coffee, and the

(1) As originally issued.

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defendants Haymen and Tucker afterwards assured Young's solicitor that they had arranged not to supply more than Young should want, Young himself instructed his solicitor not to insist on the objection, which appears to have been one rather owing to the solicitor's own caution than to Young, who had originally himself proposed to take the whole make, and who stated on his cross-examination that, after the agreement was made, he frequently pressed for larger supplies than he in fact received.

The circumstances leading up to the publication of the prospectus of the French company and to the formation of that company were as follows:—It has already been mentioned that one of the objects of the English company was to sell the patent-rights of the company. Among those patent-rights, the English company appear to have acquired from Henley a French patent; and on the 22nd of December, 1880, at a board meeting at which all the defendants were present (which was the same meeting at which the directors promised to lay Mr. Young's offer to take the whole of the company's produce before an extraordinary meeting of shareholders on the 31st of January), it was also resolved that one of the objects of such extraordinary meeting, of which notice should be given, was, "to authorize the directors to sell the French patent upon such terms and conditions as the meeting may determine, provided that such purchase shall not be less than 50,000*l.*; and also to authorize the directors to divide the amount of such purchase as they may deem desirable among the shareholders as a bonus."

On the 2nd of February, 1881, an agreement was entered into between the English company and Talbot Haymen, who was the secretary of the English company, and a brother or son of the defendant Haymen, as trustee for "The French Date-Coffee Company, Limited," whereby it was agreed that Talbot Haymen should purchase for 50,000*l.* the French letters-patent belonging to the English company.

The memorandum of association of the French Date-Coffee Company was dated the 4th of February, and stated, amongst other objects of the company, the adoption and carrying out of this agreement; and the French company was incorporated on the 5th of February, 1881.

The plaintiff had had no connection with the English company. His account of his connection with the French company was, that, on the 1st of February, 1881, he applied for 100 shares in that company, and sent a cheque for the deposit, having on that day been shewn a proof prospectus by one Fowler (1); but that, being unable to obtain a copy of the actual prospectus, he on the 4th of February, 1881, wrote a letter to the directors of the French company, as follows:—"As I cannot obtain a prospectus of your company, please withdraw my application for shares, and return me the deposit;" that, on the 7th, he received a copy of the prospectus by post, and read the advertisement of the company in a morning paper; and that he then wrote another letter to the directors, dated the 7th of February, as follows:—"*I have now read your prospectus*, and beg to withdraw my letter asking for return of deposit, &c. I hope you will allot me all possible." He swore at the trial as follows:—"The statements of profits already and those likely to be made by the agreement stated to be entered into on behalf of the parent company attracted my attention. This induced me to write the letter of the 7th of February." He stated on cross-examination that he had tasted the material itself, and that he had had faith in it as a product for ordinary commercial purposes and ordinary consumption. He was severely cross-examined as to the date when he first saw any prospectus, and when he first had any suspicions, and whether before or after the 17th of February, when 100 shares were allotted to him. His memory was not very clear as to these dates; but, in answer to the 27th interrogatory, which asked what were the statements upon which he relied when he subscribed for shares, and which of such statements he alleged to be untrue, he swore as follows:—"Before applying for shares, I had seen the prospectus of the French Date Company, and I had seen several advertisements of the Date-Coffee Company and of the French Date-Coffee Company, the general purport of which was that the Date-Coffee Company had had an immense success, and that there was every reason to suppose that the French company would have a similar success. I relied on the statements in the prospectus and the other statements as to the success of the

(1) A director of the English company.

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Date-Coffee Company: but it is impossible for me to specify particular passages or particular advertisements as being those on which I relied;" and he referred to his former answers for the statement as to the respects in which he alleged those statements to be untrue.

He stated at the trial that he saw the prospectus in a newspaper called the *Financier* on the 7th of February. This paper was put in evidence at the trial. It contained not only the prospectus of the *French* company, but a long report (immediately following the prospectus and the form of application for shares) of the extraordinary general meeting of the 31st of January of the *English* company. In this report was contained a full report of the speech of the defendant Haymen at that meeting, which was strongly relied upon by Haymen's counsel as negativing the supposition that the plaintiff could have been induced by the statement in the prospectus to suppose that the English company had already had any real commercial success in the sense of trading profit. In that speech Haymen uses language expressing the strongest confidence that the company will make very large profits: but I cannot find any statement which can fairly be read as a statement that profits in a commercial sense had as yet been made. On the contrary, he mentions the fact that one consignment only had arrived from Kurrachee, and that two more were on the way. He speaks of the profits the company "are expected to make," he explains how the English company were to obtain 50,000*l.* by the sale of the French patent and the formation of the French company, and discusses the question whether the 50,000*l.* so obtained was to be divided among the shareholders by a dividend of 4*l.* or 5*l.* per cent. He then goes on to explain the arrangement with Young above mentioned, not disclosing his name, and expresses a confident opinion that within six months the whole of the machinery would be erected and the manufacture carried on to such an extent as to produce immense profits.

The copy of the *Financier* which contained the prospectus and the speech above mentioned had also a leading article which spoke of the French company and stated "that its direction was identical with that of the original and *highly successful* company." There was no direct evidence that the plaintiff had read more

than the prospectus contained in the *Financier* of the 7th of February; but it may, I think, be assumed, when he says in his answers to interrogatories that he was induced by the prospectus and several advertisements to apply for shares, that he had the whole before him; inasmuch as the *Financier* in question has several columns of advertisements relating to the two companies, and the speech of the chairman of the English company is obviously a portion of the advertisements in question, and follows immediately after the prospectus of the French company, and all the pages of the advertisements relating to the English company and its affairs are headed in large print "The French Date-Coffee Company, Limited."

It may be noticed, in passing, that the plaintiff, when cross-examined by Mr. Pollard for the defendant Tucker, said that *he acted upon what Fowler said about the profits of the English company* (which was on the 1st of February, according to his evidence), though he added that he relied upon the prospectus.

Having now stated, as I believe, all the material facts proved at the trial, I proceed to deal separately with the several questions left to the jury, and, first, as to the responsibility for the publication of the prospectus of all or any of the defendants. As regards Haymen, this was admitted; but, as regards Tucker and Henley, it was denied.

The ground upon which the learned judge put it strongly to the jury that both Tucker and Henley were responsible was, that they were each of them largely interested in the English company, being in fact the holders of more than three-fourths of the whole number of shares in the company. I think it may be doubted whether the learned judge did not lay too much stress upon this circumstance; but I cannot say that there was not evidence, stronger perhaps against Tucker than against Henley, that they were parties to the publication of the prospectus in question. They were certainly persons taking a very leading part in all the arrangements for starting both companies. Henley was the owner of the patent according to which the manufacture was to take place. He sold his rights to the English company; and Tucker as well as Haymen by mutual arrangement were each interested in the moneys advanced to the extent of one

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third. They all three attended the board meetings at which the formation of the French company was discussed; and, if Haymen's evidence was believed, the prospectus was the joint production of the three. As regards Tucker, there was evidence that he settled the prospectus. This of itself might be of no importance if he had been merely the solicitor of the company; but, looking at the enormous stake he had in the launching of the French company for the benefit of the shareholders of the English company, and at the number of transactions in which he took a leading part with Haymen and Henley, I think there was not unreasonable ground for the verdict of the jury upon this question, and that we ought not to interfere with it.

This brings us to the most important question in the case, viz. what was the real meaning of the passage in the prospectus which was relied upon at the trial as containing false statements. Does it, fairly construed with reference to the state of things existing at the time, contain a representation that the English company had *had a commercial success*,—that it had actually carried on its trade so as to have already made a profit such as to enable it thereby to pay dividends? or does the passage in question merely express a confident belief that such *will* be the case with the English company, and that the French company is equally or even more likely to be a commercial success by reason of circumstances more favorable than those in which the English company carries on its business?

Having considered this question, as the Court is bound to do, in connection with all the surrounding circumstances at the time at which the prospectus was issued, I have come to the conclusion that the latter is the true meaning of the passage in question. The word "success" is one capable of a great many different interpretations; and, when used in relation to a new company, is to be construed with reference to the objects sought to be obtained, and to the time at which the word is applied. It is in its very nature a word expressive rather of opinion than of fact. When applied to the English company in the prospectus in question, it might be founded upon a consideration of all or any of the objects for which the English company was created,—the sale of the new product; the sale of patents to other companies; the degree of

favour in which the shares are held in the market, as shewn by the prices given for them; and other matters. It is not necessarily confined to actually proved commercial success by the sale of any given quantity before the time at which the statement is made. This being so, it is only reasonable that, if there be other words throwing light upon the word "success," in the passage relied upon as a misstatement, they should be carefully looked at in order to put the true interpretation upon the word.

So dealing with the passage in question, what do we find? First, the word "success" is coupled with the word "attending," in the present tense. Secondly, the whole passage follows upon a statement as to the cost of manufacture in France and the price of coffee in France; and speaks of the "success attending the English company when a duty of 2*d.* per lb. is payable, and coffee sold at 1*s.* per lb." only in England, as compared with 2*s.* 6*d.* in France; and ends with an expression of *confident belief* of what follows, and not with any direct statement that the English company had yet actually had a commercial success by the mere sale of its products. But then follow words upon which I must own that I have entertained considerable doubt.

After the words "they confidently believe the profits of this company will be more than sufficient to pay dividends of at least 50 per cent. on the nominal capital" (which I dismiss as being clearly words of mere hope or opinion, and not statements of fact, and therefore immaterial), follow the words, "and will exceed *those of the company working the English patent.*" It was contended that these words amounted to a statement that the English company *had* already made trade profits which had enabled it to pay dividends of at least 50 per cent. on the nominal capital. If the passage had stopped there, I think there would have been strong grounds for holding that this was its true meaning. But the words which follow, coupled with the surrounding facts, seem to me to shew that this is not the true meaning of the prospectus. After the words "will exceed those of the company working the English patent," come the following words,—"*which, having only been formed a little over twelve months,* has entered into a contract which *will* yield the return by way of annual dividends of a sum equal to the whole paid-up capital of the company of 34,000*l.*"

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Reading this passage together with the earlier words of the paragraph, I have come to the conclusion that there is not to be found in the prospectus any statement, as of an existing fact, that the English company had at the time of the publication of the prospectus already had a trading success in the sense of having divided profits of trade; but that it only expresses a confident belief that the English company *will* make dividends of a certain amount, and that the French company, by reason of more favorable conditions, *will* make even larger dividends.

This being my opinion as to the construction of the prospectus, it appears to me that there really was nothing to leave to the jury in the case, and that the learned judge ought to have given judgment for the defendants on the ground that the passage complained of contains no statements of non-existing facts, but mere expressions of opinion.

The mode in which the learned judge dealt with this part of the case was this:—In the first place he read the passage relied upon to the jury without comment. He then said, "If it could have been successfully said that all that was mere confident expectation, I do not think this action could have been maintained, because a man is entitled to commend anything with which he is connected, or to "puff" it, if you like, as long as it is a mere matter of belief. He may do that as much as he likes. But, directly he condescends to come down from the region of belief in a thing to statements or a statement of existing facts in respect of it, then, if those statements or if that statement are or is false to his knowledge, in the way I have described, he at once becomes responsible to anybody who has been induced thereby to part with his money." Having thus with perfect accuracy stated the law, the learned judge proceeded to leave to the jury the question whether the statements in question did or did not amount to statements of two matters "as existing facts,"—first, an existing success of the English company which justifies the directors in saying that the *profits* of the French company *will* be more than the English,—and, secondly, a contract entered into which *will* yield a return by way of annual dividends of a sum equal to the whole paid-up capital of 34,000*l*. He asks the jury expressly the question, "Does not this statement, this alleged

representation in the prospectus, relate to existing facts, the one fact with regard to the present and past success of the English company, and the other with regard to the description of a contract then entered into which *will* give certain results?"

With the utmost respect for my Brother Lopes's opinion, I cannot agree with him that the construction of this document was for the jury. I think it was for the judge and not for the jury to say whether, with reference to the surrounding circumstances, the statements in question were expressions of hope or belief only or statements of existing facts. It was not contested that a contract in fact had been entered into, and that that contract was a binding one upon Young, and that it bound him to take all the produce of the company; and the only question really in dispute in relation to that contract was whether the yield of the company would be so large as to make a profit by means of that contract equal to that which was said to be anticipated. This depended upon a great many things as to which the future only could decide: and it appears to me that it would be putting an unnatural construction upon the words of this prospectus, to suppose that they meant that the mere entering into any contract, however favorable, was to be taken as equivalent to its fulfilment in all respects. Whether the contract did or did not yield the return suggested must obviously depend upon the quantity of the product to be manufactured, which was a matter of the future as to which different opinions might honestly be entertained. It is, however, sufficient to say that it was a matter of opinion, and not a matter of then ascertained fact.

For these reasons, I am of opinion that, upon the only two statements upon which reliance was placed, the plaintiff has wholly failed to make out a false representation of an existing fact, and that therefore the whole foundation of the cause of action has failed; that there was no evidence for the jury of any such false representation; that the learned judge ought so to have directed the jury; and that we ought now, under Order XL., rule 10, to give judgment for the defendants on that ground.

If this view is correct, it becomes unnecessary to consider the other finding of the jury. But, inasmuch as the case may be carried to the Court of Appeal, I think it right to add that I am

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also of opinion that, even assuming that the statements relied upon could be considered as statements of existing facts, I do not think that there was any reasonable evidence that they were fraudulently made. I do not think that, even assuming the words "from the success attending" to be assertions of the fact of a past success, there was reasonable evidence of fraud. It is not, I think, at all apparent that any of the defendants did not believe in the value of the product to be manufactured, or that the amount paid by the French company for the patent was not likely to be repaid by the profits of that company, or that it had been unfairly divided amongst the shareholders of the English company, or not received by them in accordance with its objects as set out in the memorandum of association. I think there is no evidence that *at the time the prospectus was issued* the defendants were not honestly contemplating the production of 30 to 40 tons per week at Kurrachee, or that they did not honestly believe that the contract with Young, who had undertaken to take all their product, would yield the profit said to be expected, or that any alteration would take place either in the favour of the public or in the amount of the duty to be imposed (which, it was alleged, did afterwards materially injure the prospects of the company) or otherwise.

I am therefore of opinion that, upon this ground alone, the verdict entered for the plaintiff ought not to stand. But it is obvious that, if I am wrong on the other ground, and if, contrary to my opinion, it should be held that the statements in the prospectus could fairly be deemed to be statements that the English company had already divided *profits of trade* to a large extent, there would be ample evidence of knowledge that these statements in *that* sense would have been false to the defendants' knowledge. It is therefore unnecessary further to discuss the exact effect of the evidence relating to this finding.

Lastly, I am of opinion that the finding that the plaintiff was materially influenced by the statements in question, if it involves that he believed from them that the English company had already had a commercial success and divided profits earned by the business, is so unreasonable a finding, looking at the whole of the evidence, that there ought at least to be a new trial whatever

may be the opinion of the Court as to the other questions in the case.

The plaintiff was a person well acquainted with dealings in shares of companies, with prospectuses, and with Stock Exchange transactions, and was not likely to look upon a prospectus with more unquestioning faith than the average of mankind. On the contrary, he was a man to whom is peculiarly applicable the language of Lord Chelmsford in *Hallows* v. *Fernie* (1),—"It is important to see whether the plaintiff was a person likely through inexperience to be misled by a prospectus or to place implicit reliance on all that it contains." It is material also to bear in mind the nature of a prospectus and the observations applicable to it; such as that of Lord Justice Turner in *Kisch* v. *Venezuela Company* (2), and of Lord Romilly in *Dentin* v. *Macneil* (3), with reference to the common understanding of their character; observations which are of greater force when they are applied to the case of a person like the plaintiff than in the case of persons of no experience in such matters.

The plaintiff himself does not profess to have relied upon the prospectus *only*, he gives different accounts of the matters which operated upon his mind, at different times,—a conversation with Fowler; the statements as to success of the English company; the advertisements published; and, finally, he says in his answer to interrogatories that the prospectus *and advertisements* were his inducement. He admitted that the prospectus which he referred to in his letter of the 7th of February (in which he renewed his application) was published as an advertisement, and seen by him, in the *Financier* and *Telegraph* of that date. It is impossible, I think, to believe that he did not then pay as much attention to the speech of Haymen, which is a part of those advertisements under the same heading with and immediately following the prospectus of the French company, as he did to the prospectus itself; and, if he did so, then it is clear that he could not have understood the prospectus in the sense in which we were invited to understand it, viz. as speaking of a past commercial, dividend-

(1) Law Rep. 3 Ch. 467. (2) 34 L. J. (Ch.) 545 and 554.
(3) Law Rep. 2 Eq. 352.

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earning success. This makes the case very much like *Smith* v. *Chadwick* (1), lately decided in the House of Lords, in which the House set aside the finding of the judge that the plaintiff was induced to buy shares by a statement of the defendants that the present value of the turnover of a business was over 1,000,000*l.* per annum, because the plaintiff had failed to shew that he understood that statement in the sense in which he endeavoured to construe it at the trial. Indeed, this is a stronger case; for, here, as in *Hallows* v. *Fernie* (2), is a document which the plaintiff admits came into his hands at the same time and on the same paper as the prospectus, relating to the affairs of the company; and to which, under the expression "advertisements," he practically admits that he referred; and which, read by a man of business, contains clear notice that the company had only just commenced trading, and gives full information of all the facts material towards enabling him to form a judgment upon the question whether the defendants were really asserting that the English company had actually made profits by trading, so as to have paid a dividend out of those profits, at the time of the publication of the prospectus. There is also the fact that, long subsequent to the time at which the plaintiff says he first began to suspect the company, he took some shares in it, and that he admitted that he himself had formed a not unfavorable opinion of the material to be manufactured.

On the whole, I think the evidence is irresistible that the plaintiff's contention that he was induced by the prospectus (construed in the sense in which he wishes us to construe it) to become a shareholder in the company, is not a genuine contention; and that the expression in his letter of the 7th of February, "Having now seen the prospectus," falls short of proof that he was induced by the statements in it as to success and realized profits to apply for the shares he took.

On this ground also I should have thought that there ought to be a new trial. But, inasmuch as I am of opinion there was no evidence of any statement of an existing fact in the statements complained of, but that the whole was merely the assertion of

(1) 9 App. Cas. 187. (2) Law Rep. 3 Ch. 467.

hope and belief, it is in my view unnecessary and undesirable to send the case for trial again, and I think we ought therefore at once to order judgment for the defendants.

MANISTY, J. After the exhaustive judgment which has just been pronounced, I wish to add but a very few words.

The action is one for deceit. It is necessary, in order to maintain that action, not only to prove that the statements in a prospectus or any other document are not true, but it must be proved that they are fraudulently put forward with intent to deceive: and, to my mind, there is no evidence in this case to shew that there was any thing like a fraudulent intention on the part of any one of these defendants. It is to be borne in mind that one of the directors, Mr. Haymen, was the principal promoter and a very large shareholder; and, so far as the plaintiff knew at that time, and upon the prospectus, the others were Mr. Tucker, the solicitor, and Mr. Henley, the engineer.

It seems to me that, when you say you rely upon the prospectus, unless you know at the time that the engineer and the solicitor are not only shareholders but largely interested in the matter and taking an active part in it, you have no right to say you rely on the prospectus as their statements. It was proved at the trial by Mr. Haymen himself that the solicitor (Mr. Tucker) and the engineer (Mr. Henley) took part in preparing the prospectus,—that it was, as he said, the joint minds of the three; but there is not a tittle of evidence to shew that the plaintiff had any knowledge of that; and therefore you have a prospectus purporting to be that of the directors, stating who was their solicitor in the ordinary way, and who was the engineer. But the plaintiff does not say for a moment that he placed any reliance upon this statement as being their statement. I am not going the length of saying that, if he finds that out afterwards, he may not sue them: but, nevertheless, it has a great bearing upon the question of to whom he was looking and upon what he was relying,

This, then, being an action of deceit, and it being necessary to shew that the statements complained of are fraudulent as well as false, what is the position of the defendants? I take Mr. Haymen,

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because I cannot suppose for a moment that if the case fails as to Mr. Haymen, it can be supported as to the other two. Now, Mr. Haymen had no doubt a large interest in the English company. So had Mr. Tucker, and so had Mr. Henley. But the fact to my mind of importance is this, that, although 30,000*l.* was paid to the three, and divided amongst them, every penny of it was invested in the company. And then, again, when the French company bought the patent for France from the English company, 50,000*l.* was to be paid by the French company to the English company. But that fact was stated in the prospectus: and the plaintiff knew that it was going to be done. Here, again, they divided it: or, at all events a very considerable part of it came to these defendants. But, again, they invested the money in the company; and, as far as I can see, there is not a tittle of evidence to shew that Mr. Haymen from the beginning to the end acted otherwise than in the most honourable manner, believing that he was making a good investment. He left all his money in the concern; and when it came to be wound up he found that he had been mistaken, and had lost a very large sum of money. But from the beginning to the end there is nothing to shew that he was acting with the intention or under the belief that he would make money by trading in the shares, or in any other way than by investing his capital.

I do not intend to repeat what has been said by my Brother Denman, and in which I entirely agree, as to the proper construction of this prospectus. But it is worthy of note that the plaintiff himself, when examined, gave some very remarkable evidence as to how it was that he came to buy the shares. There is a good deal of evidence that a Mr. Fowler took an active part in the concern, and gave information to the plaintiff which led him to believe that it was a good concern. And this is the sort of evidence which the plaintiff gave when cross-examined by Mr. Waddy, "I had a conversation with Mr. Fowler which was always present to my mind." He had before said that Fowler represented it as an excellent concern, and was urging him to put money into it. Then he said, "I acted on what Mr. Fowler said about the profits the present (the English) company were making

and the profits which would accrue to the French company." He also says, "I relied upon what I saw in the prospectus;" and he adds, "I took the shares upon the faith of the prospectus." Again he says, and it is in the statement of claim, and was proved at the trial, that he had seen the advertisements and that he relied not only upon the prospectus, but upon other statements and upon other advertisements. It has already been mentioned, but I repeat it because I think it was not put strongly enough in the judgment which has been read, he said at one time "I had faith in the product." So had many: and, when the prospectus speaks of "the success attending the company," I think, putting a fair construction upon those words, having regard to the way in which the public were taking to the article, that this was what was meant, viz. the fair prospect of success, and not the actually achieved commercial success of the undertaking. The sales in February and March,—60,480 lbs. in the former month, and 71,680 lbs. in the latter month,—would seem to justify that sanguine view. And this is apparent from Mr. Haymen's speech, which I have no doubt Mr. Bellairs carefully read before he applied for the shares. It was unquestionably the speech of a very sanguine man: and no one could read it without seeing that his whole mind was in it, and that he was confidently looking forward to large profits. In March the shares were at a premium, and the plaintiff might have sold his: but he kept them. He paid a small deposit (2*s*. per share) on them; but never paid a call. His shares were subsequently forfeited, but not in time to save him from being made a contributory in the liquidation proceedings. And it is not until after he is sued for calls that he thought of bringing this action. Now, if he seeks to repudiate a contract which he has entered into, on account of fraud, he is bound to come forward promptly. And the plaintiff himself says that in March, 1881, within a month after he bought his shares, he suspected that he had made a mistake, and considered that the company might be a failure: but still he kept his shares; and, if they had gone up to a premium, unquestionably he would have availed himself of the rise. He had been a member of the Stock Exchange, and was still dealing in stocks and shares. That fact

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is not unimportant: and, looking to the judgment of the Court of Appeal in *Smith* v. *Chadwick* (1), I think we are only acting in accordance with the spirit of that decision in holding this action not to be maintainable. The Master of the Rolls (2) there says (3): "I think, although it is the undoubted duty of this Court to relieve persons who have been deceived by false representations, it is equally the duty of this Court to be careful that in its anxiety to correct fraud it does not enable persons who have joined with others in a speculation to convert their speculation into a certainty at the expense of those with whom they have joined." Every word of that is peculiarly applicable to this plaintiff. Lord Justice Lindley also in that case uses words which I should have used myself. "I am satisfied," he says (4) "that the plaintiff bought his shares on the general behalf that the company would be successful." That is exactly what this plaintiff did. He knew from the contemporaneous documents referred to in the prospectus all that was going on: he had faith in the product; and he bought the shares on that general belief. He acted as much from what he heard from Mr. Fowler and from other sources, as from his own general knowledge of business: and this is an attempt after a considerable lapse of time to get out of his contract by making an unfounded charge of fraud and deceit against the defendants. I entirely agree that there should be judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Owles & Collinson.*
Solicitor for Tucker and Henley: *John Tucker.*
Solicitors for Haymen: *McDiarmid & Teather.*

(1) 20 Ch. D. 27.
(2) Sir G. Jessel.
(3) At p. 67, quoting the words of Lord Justice Turner in *Jennings* v. *Broughton*, 5 D. M. & G. at p. 140.
(4) At p. 80.

[IN THE COURT OF APPEAL.]

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Aug. 4.

CRIPPS *v.* JUDGE AND ANOTHER.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1 (1), *s.* 2 (1)—*Defect in Condition of Plant—Plant unfit for Purpose for which it was used—Negligence of Employer.*

The Employers' Liability Act, 1880, which gives a workman a right of action against his employer for personal injury by reason of any defect in the condition of the plant used in the business of the employer, applies to a case where the plant is unfit for the purpose for which it is used, though no part of it is shewn to be unsound.

Plaintiff, a workman in defendants' employment, was injured by reason of the breaking of a ladder, which was being used to support a scaffold. The ladder was insufficient for the purpose for which it was being used, and the scaffold and ladder had been placed and were being used under the directions of one of the defendants:—

Held that, under the above circumstances, there was evidence that the plaintiff had been injured by reason of a defect in the condition of the plant, owing to the negligence of his employer, within the meaning of the Employers' Liability Act, 1880.

Heske v. *Samuelson* (12 Q. B. D. 30) approved and followed.

THIS was an action brought under the Employers' Liability Act, 1880 (1), to recover damages for personal injury.

The plaintiff was a carpenter, and was employed by the defendants, who were builders, to do some work in the upper storey of a villa, which the defendants were building. The staircase had not been put up, and the plaintiff had to go up and down by a ladder which stood inside the house. One of the defendants

(1) 43 & 44 Vict. c. 42. By s. 1, "Where after the commencement of this Act personal injury is caused to a workman:

"(1.) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer . . . ., the workman . . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

By s. 2: "A workman shall not be entitled under this Act to any right of compensation or remedy against the employer . . . . (1). Under sub-s. 1 of s. 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition."

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caused a scaffold to be erected, on which men stood while plastering the ceiling. The scaffold consisted of boards, which rested at one end on a piece of wood, of which one end was inserted in a hole in the wall, while the other end rested on one of the rungs of the ladder. The ladder stood against the wall in a sloping position. When the plaintiff stepped off the floor of the upper storey on to the ladder to descend, both the sides of the ladder broke in two, and the plaintiff, with the scaffold and the men who were standing on it, fell to the ground. The boards of the scaffold fell on and injured the plaintiff's foot. No evidence was given as to the condition of the ladder.

At the trial in the County Court at Watford the judge left the following questions to the jury :—Whether the ladder was fit to be used for the purposes for which it was being used at the time of the accident, and whether it was so placed and used under the directions or instructions of the defendant Judge at the time.

The jury found that the ladder was insufficient for the purposes for which it was being used at the time of the accident, and that the platform and ladder had been placed and were being used under the directions and instructions of the defendant Judge, and gave a verdict for the plaintiff for 15*l.*

A rule having been refused in the Divisional Court, the Court of Appeal granted a rule nisi to set aside the verdict and judgment and enter a nonsuit, or for a new trial, upon the ground that no evidence of any negligence on the part of the defendants was given by the plaintiff to support the verdict in his favour.

Morten shewed cause. There was evidence for the jury of a "defect in the condition of the plant" within the meaning of 43 & 44 Vict. c. 42, s. 1 (1), and of "negligence of the employer" within s. 2 (1). The case was rightly left to the jury on the authority of *Heske* v. *Samuelson.* (1)

Ruegg was called on to support the rule. *Heske* v. *Samuelson* (1) is not binding on the Court of Appeal, and was wrongly decided. There was no evidence of negligence of the employer.

BRETT, M.R. I am of opinion that there was evidence to go to the jury. The scaffold was put up under the personal control

(1) 12 Q. B. D. 30.

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of Mr. Judge, who was one of the defendants. There is no evidence that each part of the scaffold was not sound, but the question is whether the whole arrangement as used was in a safe condition. That was left to the jury, and in my opinion there was evidence on which it could rightly be left to them. The jury have found that the ladder was insufficient for the purpose for which it was being used at the time of the accident. The interpretation of the statute came before the Divisional Court in *Heske* v. *Samuelson*. (1) Lord Coleridge, C.J., said in that case "the question is whether the fact that the machine was unfit for the purpose for which it was applied, constitutes a defect in its condition within 43 & 44 Vict. c. 42. The question really almost answers itself. If it was not in a proper condition for the purpose for which it was applied there was a defect in its condition within the meaning of the Act." It comes to this, that, although each part might be sufficient, yet if the whole arrangement was defective for the purpose for which it was applied there would be a defect so as to bring it within the Act. I am of opinion that that was a right decision, and governs the present case.

BOWEN, L.J. I am of the same opinion. I think *Heske* v. *Samuelson* (1) was rightly decided, that the decision there was the only logical decision which could have been given, and that it governs this case.

FRY, L.J. I am of the same opinion. Two questions arose in this case. The first was whether there was evidence of a defect in the condition of the plant within the meaning of s. 1, sub-s. 1 of the statute; I think there was such evidence. Secondly, was there any evidence of the negligence of the employer within the meaning of s. 2, sub-s. 1? I think there was evidence to go to the jury.

Rule discharged. (2)

Solicitors for plaintiff: *Shaen & Roscoe.*

Solicitors for defendants: *Watson, Sons, & Room.*

(1) 12 Q. B. D. 30.

(2) Reported by P. B. Hutchins, Esq.

W. P.

1884
June 20.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* EDWARDS AND ANOTHER.

Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 24—*Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 140—*Compensation—Settlement by Justices of the Amount—Limitation of Time*—11 & 12 *Vict. c.* 43, *s.* 11.

The determination by justices under s. 24 of the Lands Clauses Act, 1845, of the compensation to be paid by a railway company to a landowner for having in the construction of the railway injuriously affected his land, is not an order of the justices for the payment of money within s. 11 of 11 & 12 Vict. c. 43 (which limits the time for making a complaint to six months from the time when the matter of such complaint arose), and therefore the justices have jurisdiction under s. 24 of the Lands Clauses Act, 1845, to hear and determine the question of such disputed compensation, although the application be made more than six months after the land has been so injuriously affected.

Re Edmundson (17 Q. B. 67) overruled.

APPEAL of George Henry Morse from an order of the Queen's Bench ordering the issuing of a certiorari to remove and quash an order of the justices for the county of Norfolk.

The alleged order was made by the justices on the 15th of January, 1884, on the application of George Henry Morse, who, as the owner of a piece of land in the parish of Costessy, in the county of Norfolk, claimed compensation of the Eastern and Midland Railway Company for having in the construction of their railway injuriously affected his land by stopping up a certain occupation road over which Morse had a right of way to such land. The works of that part of the railway which passes through the parish of Costessy were commenced in March, 1882, and completed in October, 1882, but long before they were commenced the claim for compensation was made, and a correspondence on the subject took place between the solicitors of the claimant and of the railway company, which lasted until the 1st of December, 1883, when finding that it was impossible to come to any agreement with the railway company, the claimant, on the 1st of January, 1884, applied to the justices under ss. 22 and 24 of the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), and s. 6 of the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), to settle the question of compensation, the claim for which did not exceed 50*l.*

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On the hearing of the case by the justices, a preliminary objection was taken on behalf of the company that the application was too late, as on the authority of *Re Edmundson* (1) the claim for injurious affection was within 11 & 12 Vict. c. 43, s. 11, and more than six months had elapsed since the matter of the complaint arose. The justices, notwithstanding such objection, heard the case, and awarded and determined "the sum of 50*l.* to be the amount of compensation to be paid by the railway company to Morse as such owner as aforesaid for and in respect of the damage sustained by him by reason of the execution of the works of the said railway, and the sum of 30*l.* to be the amount of the costs of the inquiry in this behalf to be paid by the railway company to Morse."

The railway company then applied to the Queen's Bench Division for a writ of certiorari, and that Court, on the authority of *Re Edmundson* (1), by which it considered itself bound, made the order which was now appealed against.

French, and *Synnott*, for the appellant. The determination of the justices under s. 24 of the Lands Clauses Act, 1845, of the amount of compensation is not an order for the payment of money at all, and is not within s. 11 of 11 & 12 Vict. c. 43. The Lands Clauses Act, 1845, does not state how the award under that Act is to be enforced, and usually it is by action. By s. 22 of that Act if no agreement be come to between the parties, and if the compensation claimed shall not exceed 50*l.*, the same is to be settled by the justices, and then s. 24 empowers the justices, "upon the application of either party with respect to any question of disputed compensation," authorized to be settled by the justices, to summon the other party, and "to hear and determine such question."

Supposing even 11 & 12 Vict. c. 43, s. 11, does apply, the application to the justices was in time, for the six months begin to run not from the time of making the railway, but from the time when the parties could not come to an agreement, for it is in that case, if the compensation claimed does not exceed 50*l.*, that the jurisdiction is given to the justices to settle it. However

(1) 17 Q. B. 67.

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the adjudication of the justices under s. 24 of the Lands Clauses Act 1845, is in the nature of an award and is not an order within the meaning of s. 11 of 11 & 12 Vict. c. 43, and that is the main point in this case. No doubt the case of *Re Edmundson* (1) is against the appellant's construction of the Act. That seems to have been treated as a case in which there was a claim for compensation in respect of land injuriously affected, which was to be determined by the justices under s. 24 of the Lands Clauses Act, 1845, and that as s. 124 of the Railways Clauses Act, 1845, enabled the payment to be enforced by distress, Jervis's Act, 11 & 12 Vict. c. 43, applied. That that was the ground on which that case was decided, is pointed out by Lord Blackburn, then Blackburn, J., in *Reg.* v. *Hannay* (2), where he distinguished it from the case then before the Court, on the ground that there the compensation settled by the justices was for the value of lands compulsorily taken and not for lands injuriously affected. The Court in that last case evidently did not approve of *Re Edmundson* (1), and not liking to follow it, distinguished it. It is under s. 6 of the Railways Clauses Act, 1845, that the appellant's right arose to have compensation for his land being injuriously affected by the works of the railway company, and that states that "the amount of such compensation shall be ascertained and determined in the manner provided by the Lands Clauses Consolidation Act for determining questions of compensation," and all the provisions of that last Act are to "be applicable to determining the amount of any such compensation, and to enforcing the payment or other satisfaction thereof." That therefore refers back to ss. 22 and 24 of the Lands Clauses Consolidation Act, and there is really neither in that case nor in the Railways Clauses Act, 1845, any mode for enforcing payment of the amount when settled by the justices, under s. 24. By s. 140 of the Railways Clauses Act, 1845, it is enacted that "in all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith *directed to be paid*, and the method of ascertaining the amount or of enforcing the payment thereof, is not provided for," the amount in case of dispute may be settled by two justices, and if not paid within seven days after demand may be recovered

(1) 17 Q. B. 67. (2) 44 L. J. M. C. 27.

by distress. Compensation for damage which is given by s. 6, is not the damage to which this s. 140 applies. Sect. 121 of the Lands Clauses Act, and s. 142 of the Railways Clauses Act shew the distinction the legislature has drawn between "damages" in the sense to which s. 140 applies, and "damages" in the sense used when providing for compensation for damage done by taking or injuriously affecting land. Moreover, here there was no direction to pay made by the justices, nor had they any power under the Act to direct payment; therefore s. 140 of the Railways Clauses Act, 1845, does not apply. It has been held in *Reg.* v. *Boyce Combe* (1) that the determination of the justices under s. 121 of the Lands Clauses Act as to the compensation to a yearly tenant for premises taken by a railway company, need not be in writing, it not being an order of the justices.

R. S. Wright, for the respondents. This adjudication of the justices under s. 24 of the Lands Clauses Act, 1845, was an order within 11 & 12 Vict. c. 43, s. 11. Every judicial act of the justices must be either a conviction or an order on complaint.

[BRETT, M.R. If that be so, the case of *Reg.* v. *Hannay* (2) was not rightly decided.]

No, that was not rightly decided, though perhaps it might be be distinguished, as there there was not an order on complaint. But the case of *Re Edmundson* (3) is an authority direct in point, and that case is to be preferred to *Reg.* v. *Hannay* (2), if the two conflict. The justices have no power to make an award under s. 24 of the Lands Clauses Act, but by that section they are empowered "to hear and determine" the question of disputed compensation, and they are to "settle the amount" of the costs of such inquiry. The result of what they so determine must therefore be an order, and so within Jervis's Act. It is not by the justices using the words "award and determine," that they can alter the effect of what they do or prevent their adjudication from being an order, if that is what it would otherwise come to.

[BRETT, M.R. You have to make out not only that it is an order, but an order to pay. Do you say that the justices could determine as to a man's title?]

(1) 32 L. J. M. C. 67. (2) 44 L. J. M. C. 27.

(3) 17 Q. B. 67.

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It is not necessary to say that, for assuming that the justices had no jurisdiction as to title, then as soon as it appeared that a question of title was raised their jurisdiction would be gone. If the act of the justices was a judicial one it was an order, and s. 140 of the Railways Clauses Act shews that it was to have the effect of an order to pay. An order of the justices to demolish a building upon a complaint made under a local Act, has been held to be "an order for the payment of money, or otherwise," within s. 1 of 11 & 12 Vict. c. 43, and therefore under s. 11 out of time, if the complaint was not made within six months from the day the building was completed: *Morant* v. *Taylor*. (1) So an order to enforce a rate by distress in case of neglect to pay has been held to be "an order for payment of money or otherwise," and so under 11 & 12 Vict. c. 43, s. 11, out of time, where the complaint has not been made within six months: *Sweetman* v. *Guest*. (2) The claim in the present case was rather under s. 16 than s. 6 of the Railways Clauses Act, and under that s. 16 the railway company are to make "full satisfaction for all damage sustained by reason of the exercise of the powers" of the Act; which differs in some respect from making "compensation" under s. 6.

BRETT, M.R. I do not see how *Reg.* v. *Hannay* (3) could have been decided in accordance with *Re Edmundson*. (4) I cannot understand how both those cases can be right. I think that if there had been an appeal the Court would probably have said in *Reg.* v. *Hannay* (3) that that case was governed by *Re Edmundson* (4) in order that it might have gone up to a Court of Appeal, but there being no appeal, a distinction was made between the two cases which was, I think, as fine as the shadow of a shade. If it could have been done, Mr. Wright, I am sure, would have stated what the distinction was, but he candidly admitted that the two cases could not really be distinguished, and in that I entirely agree. We have, therefore, to choose between them, for I do not think that the rule is applicable which often governs us in not overruling decisions of many years standing, on which persons may often have acted in making contracts or otherwise.

(1) 1 Ex. D. 188.
(2) Law Rep. 3 Q. B. 262.
(3) 44 L. J. M. C. 27.
(4) 17 Q. B. 67.

Where the decision is really one as to the jurisdiction of another Court, there seems to me to be no reason why, at any distance of time, a superior Court may not overrule it. I apprehend that if we were to decide in accordance with *Re Edmundson* (1), and the case were to go to the House of Lords, the House of Lords would not consider itself bound for a moment by the length of time since *Re Edmundson* (1) was decided. Therefore it comes to this: Do we agree with the decision in *Re Edmundson*? (1)

This is a claim made in respect of the injurious affecting of land, and it seems clear to me that it is within the 6th section of the Railways Clauses Act, 1845. If the claimant has a good title to the lands in respect of which he has claimed compensation for the injurious affecting, how is such claim to be determined. It seems to me it is to be determined in case of dispute by two different tribunals. When such a claim is made, two questions it is obvious may arise, the first is as to the claimant's title. The second is, as to the amount of compensation to which he may be entitled. These are two different questions, and to my mind they are to be decided by different tribunals. It is obvious that there is no express authority given to the magistrates to decide the question of title. Then are we to imply such authority? It is contrary to every idea of the English law that we should do so. In every other case, the moment a question of title arises, the jurisdiction of the magistrates is ousted; yet it is suggested that we should imply that under these Acts of Parliament they have jurisdiction to try questions of title, although such questions may be, even where the claim is under 50*l.*, very intricate. I consider no such implication ought to be made. Therefore it follows that one tribunal is to try the title, if it is in dispute, and another tribunal is to settle the amount of compensation.

Now with regard to such claim for compensation under s. 6 of the Railways Clauses Act, it is obvious to my mind that it is referred back to ss. 22 and 24 of the Lands Clauses Act, 1845. First of all, the company and the claimant must endeavour to agree, but if they do not agree, then s. 22 says if the compensation claimed shall not exceed 50*l.*, the same (that is the compensation and not the title) is to be settled by two justices.

(1) 17 Q. B. 67.

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Sect. 24 makes it lawful "for any justice upon the application of either party with respect to any question"—not of title nor of right—but "of disputed compensation" by the Act, "authorized to be settled by two justices," "to summon the other party before two justices at a time to be named," and the section then goes on to state that upon the appearance of such party, "it shall be lawful for such justices to hear and determine" what? not the whole dispute between the parties, or all the questions between the parties, but "such question," that is, the question "of disputed compensation," and that alone. That being what the justices are entitled to do under s. 24, then comes the question whether that is a determination within s. 140 of the Railways Clauses Act? The 140th section is, "In all cases where any damages, costs, or expenses are by this or the special Act" "directed to be paid." Is this determination of the justices under s. 24, of the amount of compensation an order as to anything which is directed to be paid? Obviously it is not, because before the amount has to be paid the question of title must either be admitted, or if disputed, found in favour of the claimant. Let us consider what would be the effect of saying that this is an order to pay, which it is not. The 140th section says, "Such amount in case of dispute shall be ascertained and determined by two justices." In the case before us it has already been so ascertained. Then the section says, "And if the amount so ascertained be not paid by the company or other party liable to pay the same within seven days after demand, the amount may be recovered by distress." So that the justices having awarded the amount of compensation, it may be immediately demanded, and if not paid within seven days afterwards there may be a distress, and yet ultimately it may be found that the claimant had no title at all. Therefore I come to the conclusion that to be an order, within s. 140, it must be an order to pay, which this order is not, because no payment can be enforced unless the title is either admitted or found in favour of the claimant. It is a mere assessment of the compensation, if compensation be due, as the finding of a jury under the Lands Clauses Act is a finding of the amount of compensation or purchase-money if that be eventually found to be due, that is, if the claimant has a good title. For these reasons I come to the conclusion that

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the determination of the justices under s. 24 of the Lands Clauses Act, is not an order at all, and is not within Jervis's Act, 11 & 12 Vict. c. 43.

At the time the case *Re Edmundson* (1) was decided, the working of the Lands Clauses Act had not become so well known as it is now. If it had been that case would, I think, have been decided differently. The time, I think, has now come when, upon the invitation of the Divisional Court which decided the present case, we ought, as I for one am prepared to do, to say that *Re Edmundson* (1) was wrongly decided.

BOWEN, L.J. I am of the same opinion. In the first place, it is clear that *Re Edmundson* (1) is exactly in point, and that there is no distinction at all between it and the present case.

The question is, whether the decision of justices under s. 24 of the Lands Clauses Act on the question of disputed compensation where the amount claimed does not exceed 50*l.* is an order under Jervis's Act, 11 & 12 Vict. c. 43. *Re Edmundson* (1) decided that it was, and we have to say if we agree with it. Now one always feels great hesitation in determining in the Court of Appeal adversely to a decision of long standing. It is true, as the Master of the Rolls has said, that the point involved in *Re Edmundson* (1) was not one on which probably parties have acted on the faith of the law being as there laid down; still I am not sure that that alone would get rid of my difficulty in so dealing with a case of thirty-three years' standing, because there ought, I think, to be certainty in law. However, *Re Edmundson* (1) stands in a very peculiar position. In the first place, it was a decision in which there was no appeal; and in the second place, it was a decision which, whenever it has come before the Court, has been doubted. In regard to the case of *Reg.* v. *Hannay* (2) it is quite plain to my mind that the judges who decided it would not have decided *Re Edmundson* (1) in the way that case was decided, nor would they have followed it if they had not been bound to do so.

Then there comes the case of *Reg.* v. *Boyce Combe* (3), before Mr. Justice Mellor, a judge specially competent in railway law,

(1) 17 Q. B. 67. (2) 44 L. J. M. C. 27.
(3) 32 L. J. M. C. 67.

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in which he took a different view of the award of justices, and thought it was not an order under Jervis's Act; and finally we have this present case passed up to us, as the Master of the Rolls has said, from the Queen's Bench Division, with an invitation, so to speak, to re-consider the authority of *Re Edmundson* (1).

Under these circumstances we have now to consider whether *Re Edmundson* (1) was rightly decided. It seems to me that the basis of the reasoning of that decision was that the Court thought that a proceeding for compensation under ss. 22 and 24 of the Lands Clauses Act was a proceeding for redress of an injury which had been suffered when there was an injurious affecting of land (as distinguished from taking land), and that the award of the justices therefore was in the nature of a relief given, and an award of damages within the meaning of s. 140 of the Railways Clauses Act, 1845. Now let us see whether that view is tenable. This is a case of an injurious affecting of land; and as regards ss. 22 and 24 of the Lands Clauses Act, 1845, it seems to me to be clear that all that the justices are to do is to decide what is the amount of compensation which is to be paid, and that the question of title to receive the compensation is still left undecided, and that the justices have no jurisdiction at all as to the title. The reason that any question as to title in such a proceeding does not oust the jurisdiction of the justices is that their jurisdiction is to decide only what amount of compensation is to be paid to the claimant, provided he has a right to receive any compensation at all, so that the question of title is still left completely open.

If that is so, can it be said that the assessment of an amount of hypothetical compensation is a direction as to payment of damages within s. 140 of the Railways Clauses Act? I cannot think so. I think that that 140th section was meant only to apply to cases where damages have been effectually ascertained in such a sense as to leave nothing further to be done except the recovery of them, and that it is wholly inapplicable to a case where there is a matter of right undetermined between the parties upon which the right to damages itself would depend. It seems to me that the decision of the justices under s. 24 of the Lands Clauses Act

(1) 17 Q. B. 67.

is not an order at all; for how can that be an order which neither expressly nor impliedly directs anything to be done, nor says that any consequences are to follow if a thing is not done? It is not in the popular sense of the term an order; and I can see nothing in the statute which makes it equivalent to an order. It seems to me therefore that the decision in *Re Edmundson* (1), and the basis of the reasoning therein, cannot be supported, and that that case must be overruled.

FRY, L.J. I am of the same opinion. I concur entirely in the feeling of hesitation with regard to the overruling of a case which was decided thirty years ago, and if that case had been regularly followed without expressions of dissent, my hesitation would have been increased, but looking at the circumstances, which have been very fully dealt with by the Master of the Rolls and Bowen, L.J., I think we are bound to consider whether the decision in *Re Edmundson* (1) was right or wrong. Now, in my judgment, that decision was plainly wrong. The Court of Queen's Bench in that case considered that the determination by the justices of the amount of compensation was an order; and Lord Campbell, speaking for himself, said: "It has been contended that such order amounts only to an award; but it is, at all events, an award under a statutory power, which power enables the referee to order payment of the sum awarded, and to issue a warrant of distress in default of payment;" and the same view was taken by the other learned judges, Erle, J., saying: "I think that a decision by the justices of the sum that is to be paid amounts to an order to pay that sum; and the language of s. 140 of the Railways Clauses Act clearly shews that it is treated by that statute as such." Therefore all the learned judges seem to have come to the conclusion that the ascertainment and determination of the compensation was an order, because it fell within the 140th section of the Railways Clauses Act.

Now that 140th section is in these terms: "In all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid." We are

(1) 17 Q. B. 67.

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therefore driven back upon the inquiry whether any damages have by the Act been directed to be paid. Now it appears to me to be plain that by the assessment of the quantum of damage no order or direction to pay is made. In the first place, in point of form, all that the magistrates are required to do is to ascertain and determine the amount; and in point of form there is no direction of payment. Is there, in substance, any such direction? To my mind, plainly there is not, for the reason that has been already stated. But there is a further objection to there being any such direction, namely, that there may be a question of title, and it is to be remembered that s. 24 of the Lands Clauses Act, 1845, as to determining the amount of compensation is only one of a series of clauses in which machinery is provided for ascertaining the amount, leaving the question of title and the enforcement of the rights of parties to other tribunals. In my view of the Lands Clauses Act, the justices have no more power to direct payment than the jury, sheriff, or arbitrators have who settle the question of compensation under that Act. Further, the latter words of s. 140 of the Railways Clauses Act plainly shew that that section is dealing with an order where the justices by whom it has been made have ordered a sum to be paid. I would also observe that s. 142 of that Act shews a distinction between cases of compensation and orders for payment of sums. It deals with the case where the question of compensation is referred to the determination of justices and uses language with reference to it which materially differs from the language of s. 140. For these reasons I am of opinion that the grounds upon which the Court decided *Re Edmundson* (1) are entirely wrong.

I may add that in *Reg.* v. *Hannay* (2) Lord Blackburn, then Blackburn, J., gives an additional reason for not following *Re Edmundson* (1), "When," he says, "compensation is to be settled by the verdict of the jury, there is no limitation of the period for getting it settled to six months, and this consideration should have made us hesitate to follow *Re Edmundson* (1) if we had been compelled to choose between it and a contrary holding."

(1) 17 Q. B. 67.

(2) 44 L. J. M. C. 27.

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In other words, if *Re Edmundson* (1) were right, one period of limitation would apply when the assessment is by a jury, and another when the assessment is by the justices. That is not a result at which I think we ought willingly to arrive.

Appeal allowed.

Solicitor for appellant: *A. R. Oldman.*

Solicitors for respondents: *Matthews & Browne.*

W. P.

[IN THE COURT OF APPEAL.]

July 14.

WHEELER *v.* THE UNITED TELEPHONE COMPANY.

Practice—Payment into Court—Rules of Supreme Court, 1875, *Order XXX., r.* 1—*Pleading—Payment into Court without admitting Liability.*

Where the defendant succeeds at the trial on an issue on money paid into court under Order XXX., r. 1, of the Rules of 1875, with a defence stating such payment as an alternative defence to the action, he is entitled to have judgment entered for him in the action.

In an action for trespass in breaking and entering the plaintiff's land, the defendants paid money into court under Order XXX., r. 1, of the Rules of 1875, and in their defence denied the plaintiff's possession of the land, and also stated that without admitting any kind of liability the sum paid into court was sufficient to satisfy any damage which the plaintiff might have sustained in consequence of any acts of theirs. The plaintiff joined issue upon these defences, but failed at the trial to establish any damages exceeding the sum paid into court, though he succeeded on the other issue. The Court of Appeal treated such defence of payment into court as an alternative payment, and as it went to the whole cause of action:—

Held, reversing the decision of Williams, J., that the defendants were entitled to judgment.

ACTION for trespass in breaking and entering the plantiff's land and erecting telegraph posts therein. The defence was threefold,—1. setting up that which was equivalent to the old plea of not possessed,—2. leave and licence under a title paramount,—3. that, without admitting any kind of liability, the defendants brought into court the sum of 5*l.*, and said that it was sufficient to satisfy any damage which the plaintiff might have sustained in consequence of any acts of theirs. The plaintiff joined issue upon these several defences.

(1) 17 Q. B. 67.

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At the trial before Williams, J., the plaintiff established his title to the land, and the defendants failed to prove their justification, but the plaintiff failed to establish any damages exceeding the 5*l.* paid into court. A verdict was thereupon entered for the plaintiff upon the issues raised by the first and second defences; and for the defendants upon the issue as to the quantum of damages.

Upon further consideration (Jan. 26), it was contended by *Cock* and *Packe*, on behalf of the defendants, that they were entitled to judgment in the action, as having succeeded upon a defence going to the whole cause of action. *Fillan* and *Lynch* appeared for the plaintiff. The learned judge gave judgment in the action for the plaintiff for 5*l.* damages and costs, and for the defendants upon the 3rd issue with costs: and delivered the following reasons for his judgment:—

Feb. 8. WILLIAMS, J. Judgment in this case was given by me for the plaintiff on the 26th of January last.

I was aware, as I stated at the time, that the same or a very similar case had been before myself at chambers, viz. *Goutard* v. *Carr*, which had been taken up on appeal to the Divisional Court, and ultimately to the Court of Appeal; but I was unable, after making every inquiry that I possibly could make, to ascertain what had been the result, beyond a vague rumour that the decision had in some way or under some circumstances been either varied or reversed either in the Divisional Court or the Court of Appeal; but more I could not learn. (1)

(1) The case of *Goutard* v. *Carr* was not reported because that was decided on the effect of a payment into court under Order XXX., r. 1 of the Rules of 1875, and it was supposed that the rules under Order XXII. of the Rules of 1883, had so dealt with payment into court where the liability of the defendant was denied in the defence as to make any decision on payment under the rule of 1875 of no practical utility. As the judgment of Williams, J., has shewn that not to be so, and as the decision of the Court of Appeal in the present case is founded on their former one in *Goutard* v. *Carr*, it has become necessary to give the following report of that case.

GOUTARD *v.* CARR.

The action was for damages for trespass and obstruction to a ditch of the plaintiffs. There were three defendants, but the question in this case was confined to the defendant Carr, who with a statement of defence denying the title of the plaintiffs, and

Since giving judgment, however, I find that *Goutard* v. *Carr* has been reported in the February number of the Law Journal. (1) There is, however, no report of the opinions of the Lords Justices

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of the existence of the obstruction and damage to the plaintiffs, paid the sum of 190*l.* into court, and pleaded that "if, by reason of any wrongful act of himself, his servants, agents or workmen, the plaintiffs sustained damages as in the statement of claim alleged the sum of 190*l.* is sufficient to satisfy the plaintiff's claim in respect thereof."

The action was referred and the costs of the action, reference and award were to abide the event of the award. The arbitrator found that the sum paid into court was enough to satisfy the plaintiffs' claim for damages, and as to all the other issues he found for the plaintiffs. Williams, J., at chambers, made an order ordering judgment for the plaintiffs, and that the plaintiffs should recover the costs of the action, reference and award, except the costs of the issue whether the sum paid into court by defendant Carr was sufficient, which costs the plaintiffs were to pay to such defendant. The Queen's Bench Division having confirmed the order, the defendant Carr appealed.

McIntyre, *Q.C.*, and *Shortt*, for the appellant.

Charles, *Q.C.*, and *T. Wheeler*, for the respondents.

BRETT, M.R. [After stating the pleadings, his Lordship said:—] The cause was referred by a judge's order by which it was ordered that the costs of the cause should abide the event of the arbitration. Now I think it right to deal with this action irrespectively of the arbitration, and as if it had been tried in the ordinary way by a judge and jury. What in our judgment, then, is the legal effect of a payment of money into court, when accompanied with a pleading containing expressions such as those used by the defendant in this case? I maintain the opinion entertained by Thesiger, L.J., and myself in *Berdan* v. *Greenwood* (3 Ex. D. 251, at pp. 256 and 257), which, though not necessary for the determination of that case, was expressed in words carefully considered, and formed the real ground on which we there acted. It seems to me that money could not have been paid into court in the present action except by virtue of Order XXX., r. 1 of the Rules of Court of 1875. The form of the pleading which was pleaded may be wrong, but the question here is, what is the effect of such a payment, and that must depend on the meaning of Order XXX., r. 1, under which the money was paid into court; not that I, speaking for myself, think that the form of expression used by the defendant Carr in the pleading was wrong, for I think it was only another mode of stating an alternative defence. If the money was paid in under Order XXX., r. 1, as it must have been, it was a defence in satisfaction of the cause of action in respect of which it was paid, that is in this case the whole cause of action. No doubt the defendant Carr pleaded other defences, and pleaded by way of alternative that the sum paid into court was suffi-

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(1) 53 L. J. (Q.B.) 55.

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upon the main question; and I can only find from the report that for some reasons or other not stated the Lords Justices reversed the decision of the Divisional Court, which had affirmed

Williams, J.

cient to satisfy the plaintiffs' claim, but in doing so he only exercised the right given to him by the Judicature Acts. Williams, J., seems to have thought that in consequence of the expressions used in the pleading, the money was not paid into court in satisfaction, and that the plaintiffs would not have been able to take it out of court, but I am unable to agree with him in this respect. The money could not have been paid into court, and the officer would have had no authority to receive it, and such payment would have had no effect whatever, except it was paid in under Order XXX., r. 1, and it cannot, I think, be denied that when paid into court under that rule it was a payment in satisfaction of the cause of action to which it was pleaded, and by rules 3 and 4 it would be paid out to the plaintiffs. Under these circumstances what would have been the result of a trial? Whoever tried the cause would have found all the issues for the plaintiffs but the issue on the money paid into court, and as to that issue he would have found for the defendant Carr. Then that last being an issue going to the whole cause of action the judgment ought to be for the defendant Carr, who would be entitled to the general costs of the action, and the plaintiffs to the costs of those issues on which they had succeeded. [His Lordship then dealt with the reference, and came to the conclusion that as the costs were to abide the event the defendant Carr was entitled to the general costs of the cause and reference.]

BAGGALLAY, L.J. I am of the same opinion. It appears to me that if the action had been tried in the ordinary way the observations of Thesiger, L.J., in *Berdan* v. *Greenwood* (3 Ex. D. p. 257) would have accurately described the result. Thesiger, L.J., there refers to the event "of the plaintiff succeeding in establishing his cause of action but failing to prove any damage beyond the sum paid into court or to establish any title to relief other than in damages," and he then says, "in that event the issues upon the record will be duly found in accordance with the event, and will sufficiently explain themselves; the general judgment will be for the defendant, and unless the judge otherwise orders, pursuant to rule 1, Order LV., the defendant will recover the general costs of the cause, while the plaintiff will be entitled to the costs of the particular issues found in his favour." The reasoning on which *Berdan* v. *Greenwood* (3 Ex. D. 251) was founded was expressly approved of by Lord Bramwell, then Bramwell, L.J., in *Hawkesley* v. *Bradshaw* (5 Q. B. D. 302), and, applying the general principle of *Berdan* v. *Greenwood* (3 Ex. D. 251) and *Hawkesley* v. *Bradshaw* (5 Q. B. D. 302) to the present case, I am of opinion that the defendant Carr is entitled to the general costs of the action other than those of the issues on which the plaintiffs succeeded. I am bound to say that I cannot concur in the opinion expressed at chambers by Williams, J., nor in that of the Divisional Court if it adopted the same views. It appears to me that the

the decision at chambers. But, an appeal being now a rehearing of the case, it is impossible to know from the mere result, without

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money was paid into Court under Order XXX., r. 1, and that it could be taken out by the plaintiff under rules 3 and 4. If it was not paid in under that Order I am not aware of what other authority there was for its being paid into Court.

BOWEN, L.J. I am of the same opinion. The arbitrator in this action was placed by the parties in the position of the jury. The costs are to abide the event, and the question is, what is the event where the defendant Carr has denied the trespass and also paid money into court under Order XXX., r. 1, in satisfaction of the plaintiff's claim, but only if the plaintiff has sustained damages to the amount of the money so paid into court. The question comes to this, what is the meaning of Order XXX., r. 1, and a payment into court under that rule. It is necessary to remember the distinction, as pointed out by Thesiger, L.J., in *Berdan* v. *Greenwood* (3 Ex. D. 251), between pleading several matters and a plea of payment into court. The former, which depended on statute 4 Anne, c. 16, s. 4, was long anterior to allowing money to be paid into court, and it was not until the rules of Hilary Term, 4 Wm. 4, that payment into court became noticed by the pleadings on the record. Then the Common Law Procedure Act, 1852, which dealt with the two separate matters, payment into court and pleading, enabled, by s. 70, a defendant to pay money into court in all actions, except in those particularly specified, and by s. 71 enacted that when money was paid into court it should be pleaded in the form there given, by which it was stated that the sum paid into court "is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to." It was, therefore, pleaded in satisfaction, and it never could have been pleaded with other pleas to the same matter. That is how payment into court stood until the Judicature Acts and Order XXX., r. 1. That rule deals with payment into court "by way of satisfaction or amends." Reading that with the light of s. 71 of the Common Law Procedure Act, 1852, it gives a defendant power to pay money into court in satisfaction and in bar of the plaintiff's claim, and such payment is to be pleaded as a defence, and unless it can be so pleaded I do not know the meaning of that rule 1. Then the money may be paid out to the plaintiff under rule 4, and the practice has been inveterate never to allow the money to be paid into court unless paid into court in the prescribed manner. The Judicature Acts have altered the rules, so that money may be paid into court with pleadings traversing the plaintiff's right of action. It is said by Williams, J., that there are different modes of defences with payment into court, in one the money is paid with a confession of the plaintiff's right of action, in another where it is paid in full satisfaction of the claim, but without admitting the claim, and lastly, where the claim is denied and the money is paid in conditionally only on the claim being established. Now I do not deny that there may be many ways of drawing the pleadings, and that some of the ways may be bad, but I do not think it possible to have paid money into

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more, whether the Court of Appeal has really differed from or agreed with the original decision of the Court below.

As, therefore, I gave my judgment in the present case in apparent opposition to the decision of the Court of Appeal as it is reported, I think it is only respectful to that Court that I should reduce my judgment, with the reasons for it, carefully into writing. I now proceed to deliver my formal judgment:—

This action was brought to recover damages for trespass in breaking and entering the plaintiff's land and erecting telegraph posts therein. The defendants by their statement of defence first disputed the plaintiff's possession of the land,—secondly, they justified under a leave and licence from one having title paramount,—and, thirdly, they pleaded that, without admitting any kind of liability, they brought into court the sum of 5*l.*, and said that it was sufficient to satisfy any damage that the plaintiff might have sustained in consequence of any acts of theirs. The plaintiff joined issue upon these defences.

At the trial, the plaintiff established his title to the land; the defendants failed to prove their justification; and, upon the issue as to the sufficiency of the amount paid into court, the plaintiff failed to prove any damages ultrà. The verdict was accordingly found and entered for the plaintiff upon the issues raised by the first and second defences, and for the defendants upon the question as to the sufficiency of the amount paid into court. Upon these findings judgment in the action was entered by me in the plaintiff's favour for 5*l.* damages, and costs, and for the defendants for their costs of the issue as to the quantum of damages.

For the defendants it was contended that they were entitled to judgment in the action, as having succeeded upon a defence going to the whole cause of action; and several cases were cited which

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court in this action, except under Order XXX., r. 1, and I concur in the view of the present Master of the Rolls and Thesiger, L.J., of the effect of such payment as expressed in their judgment delivered by the latter in *Berdan* v. *Greenwood* (3 Ex. D. 251), and I may add that in *Hawkesley* v. *Bradshaw* (5 Q. B. D. 302), Lord Bramwell took the same view of the law as we do in the present case.

Appeal allowed.

Solicitors for appellant: *Carr & Co.*

Solicitors for respondents: *Wright & Pelley.*

W. P.

were said to be decisive of the question in the defendants' favour. None of the cases cited appeared to me, however, to be decisions upon the point at all, although they contain here and there dicta of individual judges favourable to the defendants' contention. I think it is desirable, therefore, that I should state the precise grounds upon which I arrived at the above conclusion.

In the first place, it seems to me that great misapprehension has arisen with respect to the right and the effect of paying money into court by way of satisfaction and amends: and this has arisen from want of attention to the history of this method of meeting the plaintiff's complaint, and from the fallacy of supposing that a payment of money into court is or ever was a real defence to the action. In my judgment it is incorrect both historically and in substance to speak of a payment into court as constituting a defence to an action. It is permitted by law to be pleaded as a bar to the further maintenance of the action, and must amount in substance and in effect when so pleaded to an unequivocal plea in confession, with a tender of compensation and amends; and, when so pleaded, the plaintiff is put to his election either to accept the sum so tendered in satisfaction and have judgment for his costs, or to deny the sufficiency of the amount, in which case, if he fails to recover a larger sum, the defendant becomes entitled to the verdict and judgment in the action.

No law, from the earliest times to the present, has ever authorized the Courts to treat as a complete defence, either to the action itself or even to its further maintenance, an equivocal payment of money into court in satisfaction, coupled with the condition that the defendant's liability shall be first established.

The practice of paying money into court by way of satisfaction is about two hundred years old. It was introduced in order to avoid the risk of a plea of tender, and was at first applied only to actions of debt. It frequently happened that the plea of tender, which was necessarily accompanied by a payment of the money into court, failed because the defendant failed to prove an unconditional tender; and the practice accordingly sprang up in such cases of allowing the defendant who brought the money into court to make an offer of the amount to the plaintiff, not by way

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of defence to the action, but by way of confession and satisfaction, with a submission to pay the plaintiff's costs up to that time. This was not done by way of plea; nor was the proceeding in any way entered upon the record. It was carried out by a rule of court embodying the terms upon which the defendant offered to confess the action and make satisfaction, and making provision for further contingencies. The practical effect was, that, if the plaintiff at any time before taking the cause down for trial signified his willingness to accept the money offered in full satisfaction of his claims, he was allowed to take it and tax his costs up to the time of the payment into court; but, if he took the cause down to trial, and did not succeed in establishing a claim exceeding the amount offered by the defendant, he was deprived of the whole costs of the action, and the defendant had the whole costs of his defence. This result was brought about by the special terms of the rule.

This practice continued until the year 1833, when by 3 & 4 Wm. 4, c. 42, a defendant in certain actions was authorized by leave of the Court to pay into court a sum of money by way of compensation and amends, in such manner and under such regulations as to costs and the form of pleading as might be ordered by general rules of pleading: and by r. 17 of Reg. Gen. Hilary Term, 4 Wm. 4, it was directed that the form of plea should be as follows, or as near as might be,—"The defendant says that the plaintiff ought not *further* to maintain his action because the defendant now brings into court the sum of £——, ready to be paid to the plaintiff, and says that the plaintiff has not sustained damages to a greater amount than the said sum; wherefore he prays judgment if the plaintiff ought further to maintain his action." And under r. 19 the plaintiff was at liberty to reply accepting the sum in full satisfaction and discharge of the cause of action, and to tax his costs; or he might reply that he had sustained damages to a greater amount; and, in the event of an issue thereon being found for the defendant, the latter became entitled to judgment and his costs of suit.

So the law and practice continued down to 1852; and up to that time there is no trace of any law authorizing the Court to give judgment in the action in favour of a defendant upon a defence

of payment of money into court in satisfaction coupled with a condition that the plaintiff shall establish his (the defendant's) liability, which he in the very words in which he pays the money into court still declines to admit.

By the Common Law Procedure Act, 1852, s. 70, for the first time the absolute right was conferred upon a defendant "to pay into court a sum of money by way of compensation and amends;" and by s. 71 it was required to be pleaded as near as might be in the following terms:—"The defendant brings into court the sum of £——, and says that the said sum is enough to satisfy the claim of the plaintiff;" and by s. 73 the same consequences were attached to a plea of payment into court as had been provided by Reg. Gen. Hilary Term, 4 Wm. 4, r. 17.

During the whole time from 1833 to 1875 a defendant was never allowed, according to the practice, to plead such a plea together with other defences; it having been considered a sufficient objection to such a course that it might lead to contradictions and inconsistencies upon the face of the record; as, for example, in the event of the defendant defeating the plaintiff's cause of action altogether.

If, however, a contrary practice had prevailed, and defendants had been allowed to plead this plea together with others, it could have made no difference in the form or the substance of the plea, which, as alone authorized by the statutes, must have contained within itself a simple unconditional confession of the cause of action pleaded to, and an unequivocal and unconditional tender of amends. This was the universal, and I have no doubt the correct, reading of the statutes authorizing a payment of money into court by way of satisfaction and amends. If the Court had given leave to a defendant to plead together,—first, non-assumpsit, and secondly, payment into court, and the defendant had pleaded the second in the following form,—"The defendant, if liable, which he does not admit, brings into court the sum of £——, and says that it is enough to satisfy the plaintiff's claim,"—such a plea would have been wholly inadmissible and unauthorized, not merely by the rules of practice and procedure, but by the law itself; because it amounted neither to a defence

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to the action nor to a plea to the further maintenance of the action by an offer of full satisfaction as authorized by the statutes.

Up to this time it will be observed that the plea of payment into court never constituted a defence to the action in the strict sense; it was merely allowed as a plea to the further maintenance of the action, and did not entitle the defendant to claim judgment in the action except upon the condition of his confessing the cause of action and tendering amends to the plaintiff.

Thus the law and practice continued down to the passing of the Judicature Acts, 1873 and 1875.

The first thing to be observed in relation to these Acts is, that, although they made great changes in the practice and procedure, they made no change in the substantive law so far as relates to the matter under discussion.

The enactments upon the subject are contained in the Judicature Act, 1875, s. 16, and sched I., Orders XIX. to XXX. Under these enactments it became no longer necessary for a plaintiff to set forth his claims in formal counts each containing a definite cause of action, nor for a defendant to set forth his defences in separate and distinct pleas each directed specially to definite causes of action, and containing each a complete and entire defence. The parties are required to state their respective claims and defences in clear and concise language. Each pleading is to contain "as concisely as may be a statement of the material facts upon which the party pleading relies; such statement being divided into paragraphs numbered consecutively, and each paragraph containing as near as may be a separate allegation."

By Order XXX., it is enacted that in certain actions a defendant may at any time after service of the writ "pay into court a sum of money by way of satisfaction or amends," and the plaintiff may accept the same in satisfaction and tax his costs, or he may, as before, reply that the amount is not sufficient; and if upon an issue thereon the verdict is in favour of the defendant the same consequence follows as before, viz. that the defendant becomes entitled to judgment in the action and his costs of suit. There is, however, absolutely no change in the substantive law, which has continued unchanged from 1833 to this day.

Thus, under the Judicature Acts, great freedom and latitude is allowed as to the form and manner of pleading. Any number of claims may be joined, and any number of defences may be pleaded together, subject only to the restriction that they are not too prolix and confusing, nor framed in a manner to embarrass or delay the fair trial of the action. At the instance of either party complaining, the Court has power to order any pleading offending against this rule to be struck out or amended. Owing, however, to the carelessness or indifference of the parties, great laxity and irregularity has crept into the manner of pleading, to the great perplexity of the judges who have to try the action. And there has been great diversity in the manner and form in which defendants have paid money into court; sometimes paying it in unconditionally, to be accepted by the plaintiff in satisfaction if he is willing to accept it; and sometimes paying it in to be taken in satisfaction if the plaintiff should establish his title to compensation. One thing, however, is perfectly clear, that no new law was enacted conferring any further rights of defence by payment of money into court than had been conferred upon defendants by 3 & 4 Wm. 4, c. 42, re-enacted without the slightest addition in the Common Law Procedure Act, 1852, s. 70, and the Judicature Act, 1875, s. 16, and Sched. I. Ord. XXX.

In the present case, the plaintiff having brought an action for damages for trespass to land, the defendants pleaded a defence divided into three parts. By the first they pleaded what was equivalent to the old plea of not possessed; by the second they pleaded what was equivalent to the old plea of leave and licence under a title paramount; and thirdly they stated that, without admitting the plaintiff's claim, they brought into Court the sum of 5*l.*, and said that it was sufficient to satisfy the plaintiff's claim. No objection was taken to this form of pleading as being embarrassing; and no question of embarrassment arises either directly or indirectly. The plaintiff joined issue upon all the defences. The cause came to trial, and the verdict was for the plaintiff upon the questions of liability, and for the defendants upon the question as to the sufficiency of the amount of damages; and the simple question now is whether this last pleading amounts to the plea of payment of money into court by way of satisfaction and

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amends as authorized by the statutes, or falls short of that, and amounts only to a statement raising an issue merely as to the quantum of damages in case the plaintiff succeeds in establishing the defendants' liability, which is not admitted.

If the latter is the true meaning, it would of course constitute neither a defence to the action nor to the further maintenance of the suit under any of the statutes authorizing such a defence. In my opinion, such a pleading amounts to no more than a deposit of 5*l.* in court, together with an allegation that it is sufficient to satisfy the claim in the event of the plaintiff establishing the defendants' liability, which in the same sentence is disputed.

The question in this case is not whether a defendant ought to be allowed to plead concurrently a defence wholly denying the cause of action and an alternative defence to the further maintenance of the action by a payment of money into court by way of satisfaction and amends, but whether the present pleading does in substance and in fact amount to such a defence to the further maintenance of the suit as is authorized by the statutes; and, if not, what is the effect of it.

In my opinion this is not in substance a sufficient defence to the further maintenance of the suit as authorized by any statute, and that it amounts only to a conditional admission and averment as to the quantum of damages, with a deposit of the amount in court.

It is contended, however, that the case of *Berdan* v. *Greenwood*, in the Court of Appeal (1), is an authority to the contrary. It is scarcely necessary for me to state that if I could have read this case as being a decision to the contrary, I should at once have accepted it, and acted loyally in accordance with it, even if I was unable to take the same view myself. I am, however, unable to read *Berdan* v. *Greenwood* (1) in such a sense; and the decision is one in which I may say with deference and respect I wholly and entirely agree. I read that case as deciding that it is allowable to a defendant to plead concurrently a defence denying liability with a defence to the further maintenance of the action by payment into court of a sum of money by way of satisfaction and amends, provided the combination of defences does not

(1) 3 Ex. D. 251.

produce embarrassment; and, secondly, that, in the particular case, after the defendant had consented to abandon certain defences, all embarrassment was removed. The case was this:—It was an action brought to recover a large sum for commission. The defendant pleaded denying liability; he also set up fraud on the plaintiff's part; and, lastly, he concluded in these words,—"Lest, contrary to what the defendant believes and contends, he is under any liability to the plaintiff, he brings into court the sum of 130*l.*, and says that it is enough to satisfy the plaintiff's claim." The plaintiff applied to a judge at chambers to strike out this last defence as embarrassing in such a form, and pleaded together with defences of fraud: and it was struck out. The defendant appealed to the Divisional Court; and this decision was affirmed. The defendant then appealed to the Court of Appeal; when, under the stress of the same arguments as had been urged against him in the court below, the defendant consented to amend his pleadings, by abandoning all his defences of fraud, and also agreeing to treat the money paid into court as absolutely, and not merely *conditionally*, appropriated to the purpose of satisfaction and amends, so that the plaintiff might take the money out at once in satisfaction, and sign judgment for his costs. This appears by Lord Justice Thesiger's judgment, at pp. 255, 6, and is in accordance with my own personal recollection of the argument, which I heard.

Lord Justice Thesiger, who delivered a written judgment on behalf of himself and Lord Justice Brett, proceeds to deal with the case upon the footing that the defendant proposed to plead together two defences,—first, a denial of all liability,—and secondly and alternatively, a simple, absolute, and unconditional payment into court of a sum of money by way of satisfaction and amends. The actual decision of the case proceeded upon this basis: and it is important to notice that the objection had been taken by the plaintiff that the money was not paid into court by way of satisfaction and amends, and that this objection was at once removed by the defendant's concession that the pleadings might be treated as absolutely appropriating the money to the plaintiff in satisfaction: and there could not therefore be any actual decision, properly so called, upon what ought to have been

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the true interpretation of such a pleading, if issue simply had been taken upon it. And Lord Justice Cotton, who agreed in the judgment, expressed his distinct opinion that a pleading in such a form was not a plea of payment into court as authorized by the Common Law Procedure Act, s. 71; and he states it as his opinion that the question would yet have to be determined, whether, if the plaintiff joined issue on such a pleading, and established the defendant's liability, but failed to establish a claim to more than the defendant had paid into court, the plaintiff or the defendant would be entitled to judgment in the action.

After the defendant had consented to abandon the charges of fraud, and had admitted and even asserted that the money paid into court was absolutely appropriated to the purposes of satisfaction, all the Lords Justices agreed that there was no embarrassment to the plaintiff arising merely from the fact that such contradictory defences were pleaded concurrently and alternatively; and under these circumstances the defendant was permitted to retain his defence of payment into court; and the orders of the judge at chambers and of the Divisional Court were, as it is described, reversed.

In this result I venture with deference and respect to concur: and, so strong was my own opinion upon this point, that, shortly before that decision, viz. in 1877, I declined, as counsel for the plaintiff in the case of *Potter* v. *Home and Colonial Insurance Co.* (1), to argue the point, and I agreed at once that the defendants were entitled, in an action upon a marine policy of insurance, to plead a defence of unseaworthiness, which went to the whole cause of action, concurrently with a pleading of payment into Court in satisfaction.

It seems to me, therefore, that *Berdan* v. *Greenwood* (2) necessarily left the present question undecided.

For my own part, I not only agree with the actual decision in *Berdan* v. *Greenwood* (2); but I venture to go a step further, and to state that I see no objection upon principle to a defendant, even without bringing any money into court, disputing the amount claimed by the plaintiff as exaggerated and excessive, and stating that, even if the plaintiff is entitled to recover

(1) Not reported. (2) 3 Ex. D. 251.

anything, which the defendant denies, his claim cannot exceed a certain sum which the defendant is willing to admit that the plaintiff is entitled to if the defendant is liable. I see no objection whatever to such a pleading; and I have long been surprised that it has not been resorted to. Take, for example, an accident case in which very distinct questions arise as to liability and as to quantum of damages, involving quite distinct inquiries, with a different class of witnesses. Why should not a defendant, while denying liability, raise a distinct issue as to the amount of damages, and so if possible eliminate a separate and expensive inquiry? I can see no objection, but, on the contrary, much advantage in allowing the parties to raise such an issue. If the defendant succeeds in obtaining a verdict upon such an issue, but fails upon the question of liability, it would not of course entitle him to judgment in the action. The plaintiff in that case would be entitled to the judgment of the Court for the amount conditionally admitted to be due, and would have his costs of the action, and the defendant would be entitled to the costs of the inquiry as to the quantum of damages.

It appears to me that if a defendant desires to plead a denial of liability, and together with that to plead a payment into court of a sum of money in satisfaction, he is clearly entitled to do so, unless in the particular case it produces real embarrassment. But, if he does so plead, he ought to plead the payment into court as a true and real alternative, with an offer of confession of the cause of action, and an unconditional tender of the money by way of amends. Anything short of this is clearly not within the statutes allowing such a payment to be pleaded. Ever since the first institution of payment of money into court in pleading by way of satisfaction, the only authorised form of pleading such payment down to and including the new Rules of 1883, has been absolute, unconditional, and unequivocal, quite apart from the question whether or not there are other separate pleadings denying the cause of action; and, to construe a conditional payment into court as an absolute one, and to allow the plaintiff to take out the money without a fulfilment of the condition, seems to me to be doing violence to the language, and to be wholly unauthorised.

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It is stated that the new rules of 1883 have made some alteration, rendering the present question no longer of practical importance. I do not think that this is so; but, if there is any new rule authorizing the Court to give judgment in the action in favour of a defendant who has succeeded upon a pleading of a conditional payment of money into court, where the money has not been offered absolutely in satisfaction, but conditionally only upon the defendant's liability being established, and without an admission of liability, then in my opinion such a rule is ultra vires (1), as no statute has ever authorized such a pleading as a defence of any sort.

In the present case, therefore, I am of opinion that the plaintiff, having succeeded in the action in establishing the liability of the defendants, and the defendants having failed in establishing any complete defence to the action, or any defence to the further maintenance of the suit within any of the statutes authorizing such a defence, and having only succeeded upon a secondary issue as to the quantum of damages, the plaintiff is entitled by law to the judgment of the Court for 5*l.* and costs of the action, and the defendants are entitled to their costs of the issue upon which they have succeeded.

Judgment accordingly.

J. S.

The defendants appealed.

Moulton (*Cock* with him), for the defendants.

Fillan, for the plaintiff.

In addition to the cases cited in the judgment of Williams, J., the following was referred to: *Coughlan* v. *Morris.* (2)

BRETT, M.R. The only substantial question is, whether we are prepared to decide contrary to our decision in *Goutard* v.

(1) NOTE BY WILLIAMS, J.—The Rules and Orders of 1875 were enacted by Parliament, and formed part of the Judicature Act, 1875, 38 & 39 Vict. c. 77.

The Rules and Orders of 1883 are judicial rules only, and were made under the authority conferred upon the judges, by s. 17 of the Act of 1875, to make rules for carrying the Judicature Acts into effect, and regulating the pleading, practice, and procedure of the Court.

(2) 6 Law Rep. Ir. 405.

Carr. (1) In that case I expressed an opinion that where payment into court is allowed to be pleaded as an alternative defence, it is a defence to the action, in the sense that if it succeeds, the action is defeated. Whatever the exact form of the defence may be in words, the substance of it is that the money is paid into court, and the defence is pleaded as an alternative defence, which means that if the defendant fails in the other defences which he has set up, this is his defence to the action. If it succeeds the result is the same as if under the old system of pleading the jury had found in favour of one plea which went to the whole cause of action. In that case there would be verdict and judgment for the defendant, but the plaintiff would be entitled to the costs of issues raised by the other alternative defences which had failed. I am of opinion, therefore, that there ought to be judgment for the defendants. The appeal must be allowed.

BOWEN, L.J. I am of the same opinion. It is too late now to ask us to reconsider the decision in *Goutard* v. *Carr* (1), but I may say that I have no doubt that it is correct. When such a defence as this is pleaded, and money is paid into court, it was there decided that such payment should be treated as a payment into court, according to what was prescribed by Order XXX. of the Rules of 1875. If this were not so the defence would be incomprehensible, for why should anyone pay money into court where he can gain nothing by it? But when the defendant has the benefit of what is treated as an alternative defence there is some reason for paying into court. The result of the decision in *Goutard* v. *Carr* (1) is, that variations in the form of expression in the defence do not destroy the effect of the fact of bringing the money into Court.

FRY, L.J. I am of the same opinion. I think the present case is governed by *Goutard* v. *Carr*. (1) The principle of that decision is that payment into court, so far as that portion of the defence is concerned, is an admission of liability. I can see nothing to prevent that decision from applying to the present

(1) See note (1) ante, p. 598.

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case. Mr. Fillan has argued on the mere construction of the defence, but the admission by payment into court is more potent than the denial of liability.

Appeal allowed. (1)

Solicitors for appellants: *Parker & Ponsford.*
Solicitors for respondent: *Hatchett, Jones, & Letcher.*

W. P.

Aug. 1.

IN RE ETHEL BROWN.

Custody of Infant—Habeas Corpus—36 & 37 *Vict. c.* 12, *s.* 1—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *subs.* 10.

In the exercise of its discretion under 36 & 37 Vict. c. 12, s. 1, and s. 25, subs. 10 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the Court will look at all the surrounding circumstances before they will accede to the application of the father of a female child of tender years to remove her from the custody of the mother and other relations whose conduct with regard to the child is unimpeached, and place her under his control.

A mariner who had no fixed home, and who had already married a woman who left him and went to America more than seven years before and (as he said) died there, went through the ceremony of marriage with another woman at a registry-office at Portsmouth. Shortly after her marriage, the second wife, being informed by a stranger that she had received a letter from the first wife after the ceremony at the registry-office, quitted her supposed husband, and went to reside with her parents at Southampton where she gave birth to a female child. She afterwards took proceedings against her husband for bigamy: but, for want of proof that the first wife was living at the time of the second marriage, these became abortive.

The child having reached the age of nine, the father (without shewing any efforts to ascertain whether his first wife was living or not) applied to a judge at chambers for a habeas corpus to obtain its custody. The judge refused the application. The father appealed.

The Court,—not being satisfied that the second was a valid marriage, or that the father was in a position properly to maintain and educate the child:—

Held, that the judge had wisely exercised his discretion, and dismissed the appeal, and also that the failure of the prosecution for bigamy was not entitled to any weight upon a motion of this kind.

APPEAL from the refusal of a judge at chambers to grant a habeas corpus to bring up the body of Ethel Brown, a female infant of the age of nine years, in order to her being handed over to the custody of the father. The facts were these:—The

(1) Reported by P. B. Hutchins, Esq.

parents of Ethel Brown were married at a registry-office in Portsmouth. The father had been previously married to another woman who, as he told the second wife, left him more than seven years ago and went to America where she died. Shortly after the second marriage, and before the birth of the child, the mother was informed by a stranger who had known the first wife that the first wife was then living, and that the informant had received a letter from her since the date of the second marriage; but the informant refused to produce the letter. Acting upon this information, and being dissatisfied with the conduct of her supposed husband, the second wife left him and went to reside with her father and mother at Southampton, where she gave birth to her child and was still living with it. She afterwards instituted proceedings against her husband for bigamy: but, in the absence of evidence that the first wife was alive at the date of the second marriage, and that the husband knew that fact,—the person who had stated that she had received a letter from her not being forthcoming,—these proceedings became abortive, the grand jury throwing out the bill.

There was no suggestion on the part of the applicant that the child was not being properly cared for and educated by the mother and her parents; and on the other hand it was sworn that the father was a person without any fixed home, being employed as a mariner on board a yacht, and frequently absent from England for long periods, and was not in other respects leading a creditable life, The affidavit of the father, however, denied the latter allegation.

Crump (*Banks* with him), for the appellant, relied upon the failure of the prosecution for bigamy as being conclusive of the legitimacy of the child (the validity of the marriage standing unimpeached), and consequently of the father's common-law right to her custody; and he submitted that there was nothing in any of the affidavits to warrant the interference of the Court to control that primâ facie right.

Horace Brown, for the respondent, relying upon the dicta of Lord Eldon in *Wellesley* v. *Duke of Beaufort* (1), of Knight

(1) 2 Russ. 1.

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Bruce, V.C., in *Ex parte Fynn* (1), and of Lord Coleridge, C.J., in *In re Goldsworthy* (2), submitted that, regard being had to all the circumstances of the case, and especially to the fact of the applicant being without a settled home, and the extremely unsatisfactory evidence as to the validity of his alleged marriage with the infant's mother, notwithstanding the failure of the indictment for bigamy, the learned judge at chambers exercised a sound discretion in declining to order the child to be removed from the custody of those who had hitherto so well cared for her; and that his discretion ought not to be interfered with.

LINDLEY, L.J. I am of opinion that the order of the learned judge should not be disturbed. This is a peculiar and unusual case. It is an appeal from an order made at chambers, refusing to grant a writ of habeas corpus to bring up a female child of about nine years of age in order to her being delivered over to the custody of her father. The facts are shortly these:—The appellant and the mother of the child were married at a registry office in Portsmouth; he informing her that he had been married before, but that his first wife had left him and gone to America, where she had died. Shortly after the second marriage, and before the birth of the child in question, the second wife was informed by a woman (whose name was mentioned, but who refused to make an affidavit,) that the first wife was living at the date of the second marriage, and that she (the informant) had received a letter from her. In consequence of this information, and of the alleged immoral conduct of the appellant, the respondent left him and went to reside with her father and mother, where she and her child still remained. Proceedings were subsequently taken against the husband for bigamy: but, inasmuch as the first wife was proved to have been absent from England for more than seven years before the second marriage was contracted, and there was no evidence to shew that she was alive at the date of the second marriage,—the woman referred to declining to produce the alleged letter or to give evidence,—the grand jury threw out the bill. Under these circumstances, the father claims

(1) 2 De G. & Sm. 457. (2) 2 Q. B. D. 75, 82.

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to be entitled to the custody of the child. Now, there is no suggestion that the child is not properly cared for by those in whose custody she now is: and it appears from the affidavits which have been produced in answer to his application, that the father is employed as a mariner on board a yacht, and has no settled home, but is absent on voyages for months together; and other circumstances are mentioned tending to shew that he is not a fit person to have the care of a young child. The matter rests no longer upon the common law: The Judicature Act, 1873 (36 & 37 Vict. c. 66), in s. 25, sub-s. 10, enacts that, "in questions relating to the custody and education of infants, the rules of equity shall prevail." One of those rules, which applies to this case, is the provision of s. 1 of 36 & 37 Vict. c. 12, which enacts that, "from and after the passing of this Act, it shall be lawful for the High Court of Chancery in England or in Ireland respectively, upon hearing the petition by her next friend of the mother of any infant or infants under sixteen years of age, to order that the petitioner shall have access to such infant or infants at such times and subject to such regulations as the Court shall deem proper, or to order that such infant or infants shall be delivered to the mother and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein until such infant or infants shall attain such age, not exceeding sixteen, as the Court shall direct; and further to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants, and otherwise, as the said Court shall deem proper." We are asked to hand over the child to the custody of a man without a home, and apparently an unreliable person, who does not suggest what he is able to do for her, but who stands upon his strict legal rights as her father. As to the failure of the prosecution for bigamy, I do not think we ought to be influenced by that; for, the success of a prosecution of that sort depends upon evidence altogether different from that which is required in an application of this kind. But I must say I am by no means satisfied that the second marriage was a valid one: the evidence to support it is in the highest degree unsatisfactory. Upon the whole, I think the learned judge who declined to accede to the

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application had clearly a discretion in the matter, and has exercised it wisely. The appeal must be dismissed, and with costs.

BRETT, M.R. I am entirely of the same opinion.

Appeal dismissed.

Solicitors for appellant: *Speechly, Mumford, & Langdon.*

Solicitors for respondent: *Joel Emanuel & Co., for Bell & Taylor, Southampton.*

J. S.

June 23.

JACKSON *v.* HILL & CO.

Master and Servant—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90) *—Definition of "Workman."*

By an agreement in writing between H. & Co., manufacturers, and J.,— reciting that J. having a knowledge of mechanics, and H. & Co. requiring the services of a person having such knowledge "to assist the firm as a practical working mechanic in developing ideas they the firm might wish to carry out, and to himself originate and carry out ideas and inventions suitable to the business of such firm if such inventions were approved by them,"—it was mutually agreed that J. should be employed by the firm "for the purpose above specified:"—

Held, that J. was not "a mechanic or workman" within the Employers and Workmen Act, 1875.

CASE stated by justices under 20 & 21 Vict. c. 43, s. 3.

The appellant was summoned before two magistrates under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90). He was employed by Messrs. Hill & Co. upon the terms set forth in two several agreements which were put in evidence before the magistrates, the terms of which were as follows:—

Memorandum of agreement made this 14th day of March, 1882, between C. G. Hill and John Wightman, trading under the style or firm of C. G. Hill & Co., of Nottingham, manufacturers (hereinafter called "the said firm"), of the one part, and C. Jackson, of Nottingham, mechanic, of the other part: Whereas the said C. Jackson having a knowledge of mechanics, and the said firm requiring the services of a person having such knowledge, to assist the said firm as a practical working mechanic in developing ideas they the said firm may wish to carry out, and as far as possible to himself originate and carry out ideas and inventions suitable to the business of the said firm, if such inventions are approved by the said firm; they the said C. G. Hill & Co. agree to employ the said C. Jackson and the said C. Jackson agrees to be employed by the said firm

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for the purposes above specified, on the following terms and conditions: This agreement shall commence on the 21st of March, 1882, and shall continue thenceforth for and during the term of seven years to run consecutively, and subject to the clauses hereinafter stated,—The hours of work to be the usual hours worked by the mechanics employed by the firm, viz. 54 hours per week: And it is agreed that the said firm shall pay the said C. Jackson, in consideration of the due and proper performance of the duties hereinbefore mentioned, the sum of 5*l.* per week during the continuance of this agreement: And it is further agreed by the said firm and the said C. Jackson that, should the said firm wish to discontinue the services of the said C. Jackson, they the said firm shall have full power to terminate this agreement after the expiration of the first and fourth years of this agreement, by giving to the said C. Jackson one clear month's notice to that effect prior to the expiration of the said year or years: And it is further agreed that the full amount of wages shall be paid without any deductions so long as the said C. Jackson attends properly and punctually to his time at the business premises of the said firm, the times of work to be as before stated, except in case of absence from illness, holidays, or other causes, when it shall be reserved to the power of the said firm to deduct the time lost by such illness, holidays, or other causes, proportionately to the weekly sum paid: And in consideration of the sums hereinbefore stated the said C. Jackson agrees to truly and faithfully serve them the said firm in whatever may be required of him as a mechanic in the manner previously described, their secrets keep, and lawful instructions obey; and further that the said C. Jackson shall not nor will during the aforesaid term of seven years enter into the service of or otherwise give advice to, serve, or assist as a mechanic any person or persons other than the said firm, either in manufacturing or repairing machinery, or in anything appertaining thereto, or in any business, trade, or mystery whatsoever, and shall not nor will under any pretence at any time or times hereafter publish, disclose, or make known any peculiar art or method used by the said firm in their said art or business or mystery, or in any way relating thereto.

(Signed) C. G. Hill & Co.
C. Jackson.

March 9, 1883. Heads of an agreement between Messrs. C. G. Hill & Co. and Mr. C. Jackson:

1. Jackson to pay all expenses incurred in connection with the patent No. 4649, Sept. 3, 1882, up to this date:

2. Messrs. Hill & Co. to pay 198*l.* 10*s.* down, and all further expenses in connection with the patent:

3. Jackson to hand Messrs. Hill & Co. the machine which he has constructed, and the same to become their property:

4. Jackson to assign the patent when required to Messrs. Hill & Co., and also (*a*) to disclaim under Mr. Hill's directions any portions of the provisional specification which shall be proved to Jackson to be bad, and (*b*) to proceed with the patent in any way which may be required:

5. Jackson to continue to work upon the terms of the agreement of the 14th of March, 1882, and to serve Messrs. Hill & Co. upon the terms of that agreement for the remainder of the seven years, with the exception that the salary is

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to be 7*l.* per week, to include remuneration for all ideas and inventions connected with the frilling trade.

The plaintiff entered the service of Messrs. Hill & Co. upon the terms of the two agreements above-mentioned and for a time was treated as "an inventor," and worked by himself in a separate room. But, disputes having arisen between him and Messrs. Hill & Co., he was in December, 1883, removed from that room, and required to work in "the shop" as an ordinary practical mechanic at work which was usually performed by a workman at wages of from 4*s.* to 6*s.* a day. The plaintiff resented this, and ultimately Messrs. Hill & Co. summoned him before the magistrates under the Employers and Workmen Act, 1875, for neglect of duty in unduly absenting himself from his work without lawful excuse, and they claimed 10*l.* as damages.

Evidence having been given in support of the complaint, and certain correspondence put in, it was contended on behalf of the appellant that he had not since December, 1883, been properly employed by Messrs. Hill & Co. under the two agreements above set out, and therefore had not been improperly absent from his work so as to bring him within the Employers and Workmen Act, 1875.

For the respondents it was insisted that the appellant under the terms of the agreement was bound to work as "a practical working mechanic," and that he had improperly absented himself.

The magistrates convicted the appellant in the penalty of 8*l.* 16*s.* 8*d.*

The question for the opinion of the Court was whether the appellant was bound so to work under the two agreements, and whether or not he had been improperly absent.

Moulton, for the appellant. The Employers and Workmen Act, 1875, has no application to an employment like that which this appellant agreed to undertake. It was meant to embrace such artificers and handicraftsmen as are mentioned in the interpretation clause, s. 10, of that Act, and persons ejusdem generis. By the recital in the agreement of March, 1882, it is plain that Jackson was a person of superior knowledge, and was to assist in developing ideas originating with the firm, and himself to originate

and carry out ideas and inventions suitable to the business of the firm. This was the work he was retained for, and not, as the magistrates seem to have thought, to work as an ordinary practical mechanic or workman. He was not bound to work otherwise than in the special manner described in the agreement. There was no evidence before the magistrate that there was work of that description for him to do.

Vesey Fitzgerald, contrà. The question is whether the appellant has not wilfully omitted to do the work which he was bound under his agreement to do. That is not a question of law, but rather one of fact for the determination of the magistrates: and, if that be so, the magistrates have decided it in the affirmative, and this Court will not interfere.

[DAY, J. If the magistrates mean that the appellant was bound under his agreement to do what an ordinarily skilled mechanic would be bound to do, I must say I do not agree with them.]

The appellant was summoned for improperly absenting himself from his work; and that charge was fully borne out by the evidence.

DAY, J. It is difficult at first sight to see what the magistrates have really decided. But, when one reads the whole case, it is pretty evident that they mean to hold that the appellant was bound by the agreement to do whatever any practical mechanic would be bound to do. That clearly is not the proper construction of the agreement. By that the appellant engaged to do, not ordinary mechanical work, but, being a person having superior mechanical knowledge, he was to employ that knowledge in doing as in the agreement is recited, viz., in assisting the firm "as a practical working mechanic in developing ideas the firm wished to carry out, and in himself originating and carrying out ideas and inventions suitable to the business of the firm," subject to their approval. That is something very different from an employment as an ordinary practical working mechanic: it is a totally different class of work. Every one knows the difference in degrees of labour. For instance, no one would think of requiring a stud-groom to groom cart-horses, or a groom of the chambers or a butler to clean his boots. Here the respondents

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bound themselves to employ the appellant, not in merely mechanical work, but in a higher class of labour, viz. developing ideas originating with his employers or inventing and carrying out ideas and suggestions of his own in furtherance of the business of the firm. Upon the best consideration I can give to the case, I think the magistrates have misconstrued the agreement, and have wrongly convicted the appellant.

SMITH, J. I agree with my Brother Day that it is somewhat difficult to discover what it is that the magistrates have decided. The agreement of March, 1882, recites that Jackson having a knowledge of mechanics, and Messrs. Hill & Co. requiring the services of a person having such knowledge, — to do what? "To assist the firm as a practical working mechanic in developing ideas the firm may wish to carry out, and as far as possible to himself originate and carry out ideas and inventions suitable to the business of the firm," if approved by them. Then it is mutually agreed that Jackson shall be employed, at first at a salary of 5*l.* a week, and afterwards of 7*l.* a week, "for the purposes above specified." He was not engaged as an ordinary practical mechanic to make or repair machines where no idea was to be developed or inventive genius to be exercised. For some reason the firm thought fit at a certain period to make an alteration in their mode of treating the appellant, requiring him to do such work as any ordinary mechanic at wages of 6*s.* a day would do, instead of the superior class of work which he had contracted for. The justices have in effect decided that he was bound under the agreement to work as an ordinary practical mechanic. I think the construction they have put upon the agreement was wrong, and that the appeal must be allowed. The construction of this statute was recently under the consideration of this Court in a case of *Morgan* v. *London General Omnibus Co.* (1)

Judgment for the appellant.

Solicitors for appellant: *Smiles, Binyon, & Ollard, for Duignan, Lewis, & Elliot, Walsall.*

Solicitors for respondent: *T. W. & T. B. Nelson, for T. G. Rawson & W. T. Cartwright, Nottingham.*

(1) 12 Q. B. D. 201.

J. S.

THE IMPROVEMENT COMMISSIONERS FOR THE DISTRICT OF NEWTON IN MAKERFIELD *v.* THE JUSTICES OF THE PEACE FOR THE COUNTY PALATINE OF LANCASTER.

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June 11.

Highway—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict.* c. 77), s. 13—*Disturnpiked Road*—18 & 19 *Vict.* c. c.—*Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict.* c. 34), ss. 47, 49, 50, 51—*Expiration of Turnpike Trusts in* 1877—*Cesser of Turnpike Road—Main Road—Contribution from County for Repair.*

By a local Act (18 & 19 Vict. c. c.) incorporating the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), the maintenance of all highways within a district including a turnpike road became vested in commissioners. The trustees of the turnpike road thereupon ceased to repair it within the limits of the district. The turnpike trust expired in 1877. The commissioners were the "highway authority" for the district, which was a "highway area" within the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13:—

Held, that, notwithstanding the special legislation providing for the maintenance of the road by the commissioners, it only "ceased to be a turnpike-road" within the meaning of s. 13 of the Highways and Locomotives (Amendment) Act, 1878, on the expiration of the turnpike trust between 1870 and the date of the passing of that Act, and therefore should be "deemed to be a main road," and one-half of the expenses of the maintenance of the part within the highway area should be paid to the highway authority by the county authority under s. 13.

SPECIAL CASE stated by consent.

The plaintiffs were the improvement commissioners for the district of Newton in Makerfield, in the county of Lancaster (hereinafter called the commissioners), and were the highway authority for the district, and the district was a highway area within the meaning of the Highways and Locomotives (Amendment) Act, 1878.

The defendants were the justices for the county of Lancaster (hereinafter called the said county authority), these justices in annual general sessions, pursuant to 38 Geo. 3, c. 58, were the county authority as defined by the Highways and Locomotives (Amendment) Act, 1878, and at the annual general session held on 26th of December, 1878, they by order declared under s. 20 of the last-mentioned Act that the contribution towards the expenses incurred in repairing the main roads within the hundred

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of West Derby should be paid out of a separate rate to be raised and charged upon the hundred of West Derby.

The commissioners were incorporated by the Newton District Improvement Act, 1855 (18 & 19 Vict. c. c), which Act incorporated the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34).

The commissioners' district comprised the limits of the parish of Newton in Makerfield, in the county of Lancaster.

The district was traversed by a road running from south to north from Warrington to Wigan.

The road was maintained under the powers of a private Act of 13 Geo. 1, c. x., and 20 Geo. 2, c. viii., 10 Geo. 3, c. lxx., 33 Geo. 3, c. clxiv., 53 Geo. 3, c. cxxxi., 3 Wm. 4, c. lxxiv., 35 & 36 Vict. c. lxxxv., and was known as the Warrington and Wigan turnpike road.

Upon the passing of the Newton District Improvement Act, 1855, the maintenance of all streets and highways within their district, including the road, became vested in the commissioners by virtue of ss. 47, 49, 50, and 51 of the said Towns Improvement Clauses Act. And the trustees of the turnpike road thereupon ceased to repair the road within the limits of the district.

The Warrington and Wigan turnpike trust expired in 1877.

In 1878 was passed the Highways and Locomotives (Amendment Act, 1878 (41 & 42 Vict. c. 77), s. 13, of which enacts that, "For the purpose of this Act, and subject to its provisions, any road which has within the period between the 31st day of December, 1870, and the date of the passing of this Act ceased to be a turnpike road, and any road, which being at the time of the passing of this Act a turnpike road may afterwards cease to be such, shall be deemed to be a main road, and one-half of the expenses incurred from and after the 29th day of September, 1878, by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate on the certificate of the surveyor of the county authority, or of such other person or persons as the county

authority may appoint, to the effect that such main road has been maintained to his or their satisfaction."

Separate accounts of the expenses of the maintenance of the road during a period between the 25th of March, 1882, and the 25th of March, 1883, had been duly kept by the commissioners in the form prescribed by the county authority, and had been audited by the Local Government Board auditor, and forwarded to the county authority within the time prescribed.

The accounts so audited shewed an expenditure on the road for the period aforesaid of 121*l.* 1*s.* 8*d.*, one-half of which was 60*l.* 10*s.* 10*d.*

It was admitted for the purposes of this case that all the requirements of s. 18 of the Highways and Locomotives (Amendment) Act, 1878, and all other requirements of or directions issued by the county authority in respect thereof had been duly complied with, and that no objections should be taken to an order for payment as hereinafter mentioned upon the ground that no general certificate of such satisfactory maintenance had been in fact given.

The commissioners as such highway authority as aforesaid had under s. 13 of the Highways and Locomotives (Amendment) Act, 1878, demanded from the justices as such county authority as aforesaid payment of the said sum of 60*l.* 10*s.* 10*d.*, being one-half of the said sum of 121*l.* 1*s.* 8*d.*, the expenses incurred by the commissioners between the 25th day of March, 1882, and the 25th day of March, 1883, in the maintenance of such part of the road as was within the limits of the district.

The justices as such county authority refused to pay the sum or any part thereof.

The question for the opinion of the Court was whether the county authority under the circumstances above stated was liable by virtue of the Highways and Locomotives (Amendment) Act, 1878, or otherwise, to pay out of the county rate the sum above demanded, or any part thereof. In case the Court should be of opinion that the county authority was so liable, judgment was to be entered for the plaintiffs with costs, otherwise for the defendants with costs.

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Wills, Q.C. (*A. Glen* with him), for the plaintiffs. The Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), s. 13, provides for contribution by the county to the maintenance of roads which have since 1870 ceased to be turnpike roads. The road from Warrington to Wigan has ceased to be a turnpike road since 1870, viz., when the turnpike trusts expired in 1877, and not before, and therefore the plaintiffs are entitled to contribution from the defendants. The case is concluded by two decisions of the House of Lords: *Justices of Lancaster* v. *Mayor of Rochdale* (1); *Justices of West Riding* v. *The Queen* (2).

Gorst, Q.C., for the defendants. The road ceased to be a turnpike road before 1870, and therefore s. 13 does not apply. *Justices of Lancaster* v. *Mayor of Rochdale* (1) is an authority in favour of the defendants. There one at least of the roads radiating from Rochdale had ceased to be turnpike before 1870. See, per Mathew, J., giving judgment in the Divisional Court (3), and per Lord Blackburn in the House of Lords (4). The House of Lords held that the road had not ceased to be a turnpike road and become a "main road" between 1870 and 1873 within s. 13. The present case is identical with that of the Rochdale and Halifax road in *Justices of Lancaster* v. *Mayor of Rochdale* (1). A piece was cut off the Wigan and Warrington road in 1855; in 1877 the trusts expired. The Court is now asked to hold the county liable for the repair of the piece cut off in 1855, despite the judgment of the House of Lords making no distinction, and giving judgment for the county in respect of all.

To satisfy the terms of s. 13 the whole road must cease to be turnpike after 1870.

Justices of West Riding v. *The Queen* (2) is more difficult. The House of Lords held that some portions of roads removed by a provision in the Turnpike Acts, and other portions removed by an agreement from the operation of the turnpike trusts, were still turnpike roads within s. 13 of the Act of 1878. So that unless there is a distinction between the *Rochdale Case* (1) and the *Sheffield Case* (2) they are not in accord; but in the latter Lord FitzGerald

(1) 8 App. Cas. 494.
(2) 8 App. Cas. 781.
(3) 6 Q. B. D. 525, at p. 527.
(4) 8 App. Cas. 494, at p. 497.

says (p. 797), that it does not militate against the former decision. The distinction may be this, viz., that in the *Rochdale Case* (1) several clauses of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), were incorporated, giving the management of the roads to the commissioners, and vesting all materials in them, &c., see ss. 47, 48, 49; whereas in the *Sheffield Case* (2) there was, as to two of the roads, the mere provision in s. 34 of the Turnpike Act, 6 Wm. 4, c. liii., that no part of the money arising by virtue of that Act should be laid out on any highway in the town, nor should any toll be collected there; and as to the third road, there was no more than an agreement between the turnpike trustees and the corporation. In the present case the Towns Improvement Clauses Act, 1847, is incorporated with the local Act.

Wills, Q.C., replied. The special legislation whereby another source was provided for the maintenance of this road in 1855, did not cause it to lose its character as a turnpike road. It remained both in a physical and technical sense a turnpike road until the expiration of the turnpike trusts. In the *Sheffield Case* (2) and in the present one, another fund was provided by the special legislation for the road; but the turnpike trusts did not expire until after 1870. The two cases are identical, and the plaintiffs are entitled to recover.

MATHEW, J. This is an action by the highway authority for the district of Newton in the county of Lancaster against the county authority to recover contribution in respect of the expense of maintaining a road within the district of the plaintiffs. The road had been part of the turnpike road between Warrington and Wigan, and there had been with respect to that part of the road what I will describe compendiously as special legislation in the year 1855, the result of which was that the cost of maintaining that part of the road was transferred from the turnpike trust to the commissioners of Newton district.

It appeared further in the statements of the case that the turnpike trust in respect of the whole road from Warrington to Wigan had ceased in 1877. On that, it was contended by the

(1) 8 App. Cas. 494. (2) 8 App. Cas. 781.

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plaintiffs that the state of things had arisen which was contemplated by the Act of 1878, s. 13, viz., that the turnpike road had ceased to be a turnpike road within the meaning of that section, and that it followed that, according to the provisions of that section, the highway authority became entitled to recover contribution from the county authority towards the maintenance of the whole of the road, including that part of the road in question. It is agreed that all proper steps have been taken in maintaining the road and demanding contribution, and the defendants have refused to pay. The question is whether the plaintiffs are entitled to recover contribution or not. The case presented to us on the part of the plaintiffs by Mr. Wills, in his argument stated shortly was this: There had been special legislation, no doubt, in 1855 with respect to the part of the road in question; but that special legislation did not cause that part of the road to cease to be part of the turnpike road, and no cesser within the meaning of s. 13 took place until the turnpike trust expired. When that happened, in the year 1877, the Act which followed in the year 1878 became applicable, and the plaintiffs were entitled to recover. The argument, presented on the other side by Mr. Gorst, was this: The special legislation as to this part of the road had caused a cesser of the character of the turnpike road with respect to this part of it; s. 13 can only apply to the case where the whole of the turnpike road ceases to be a turnpike road within the meaning of the Act, and as part had ceased to be turnpike road, and as the section only applies to the whole road, the section is not applicable at all, and the defendants are not liable.

It is singular that in this discussion Mr. Wills relied with the utmost confidence on the *Rochdale Case* (1), and on the *Sheffield Case* (2) which he said logically followed as a consequence of the *Rochdale Case* (1), and Mr. Gorst with equal confidence argued that the *Rochdale Case* (1) was in his favour, and he left the *Sheffield Case* (2) to take care of itself. He pointed out that the judgment of the Queen's Bench Division established his argument, and that the ground of the decision of the *Rochdale Case* (1) by the Court of which I was a member was, as he put it, that

(1) 8 App. Cas. 494. (2) 8 App. Cas. 781.

there being a cesser, as it was admitted, of the turnpike character of part of the road, s. 13 did not to apply to such a case, and therefore Mr. Gorst said his point was established. Having taken part in that decision I was astonished at his gloss on it, for I am sure it was not my intention nor that of Williams, J. to decide anything like that which Mr. Gorst understood the case to determine. The language of the judgment cannot be clear, as Mr. Gorst misunderstood it, but if the judgment were to be delivered again I should be content to express the meaning of the Court in the language in which it was conveyed. What we meant to decide was this: that the special legislation in that case with respect to part of the road, was not a cesser within the meaning of s. 13.

It was said that we drew a distinction between a part of the road and the whole of the road. Our conclusion would have been exactly the same if the whole of the turnpike road had come under the operation of the special legislation. We thought that the provisions made by the special legislation for the maintenance of that part of the road did not cause it to cease to be a turnpike road, and that it was a turnpike road not only in a technical but a physical sense. It was a main artery of communication between two great towns, and it did not seem to me to cease to be a turnpike road because, on the town having sprung up beside the borough, the legislature thought fit to specially legislate with respect to that part of the road which lay within the borough.

Our judgment was a short one. Mr. Gorst says it was misunderstood in the Court of Appeal and we were supposed to have decided that there had been a cesser as to part of the road, and that therefore the cesser as to part precluded the operation of s. 13.

But I cannot adopt that view. I think the Court of Appeal appreciated precisely what we had decided, and the Court of Appeal differed from us. The Court of Appeal thought the special legislation had determined the *road*. We thought it had not. That was the difference between us, and that was presented to the House of Lords. It is an extremely narrow point on the construction of the word "cease" in s. 13. The House of Lords took the view of the Queen's Bench Division and differed from

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the Court of Appeal, also appreciating clearly the point of difference between the two inferior tribunals. The *Sheffield Case* (1) presented in one respect the same point which had been argued in the *Rochdale Case* (2), the only material difference between the two being that in the *Sheffield Case* (1) there had been cesser by expiration of the turnpike trust. The case was argued in the House of Lords with all that fullness and aptness of illustration and learning which we invariably expect from Mr. Wills, and he convinced the House of Lords, and it was impossible (if I may say so) not to have been convinced by his argument. Lord Blackburn in his judgment adopted that argument. The ground of the decision is clear. The argument was that the special legislation in that case which applied to one of the roads and the agreement which applied to another of the roads had no operation to extinguish the character of turnpike road that the whole road possessed. Again, it was said that the character of a turnpike road is physical as well as technical. Lord Blackburn entirely adopted the view that the effect of the special legislation and the agreement was not to destroy the character of any portion of the road as a turnpike road. The effect of the legislation and the effect of the agreement was only to provide another source for the maintenance of a part of the turnpike road. So it was held that the highway authority was entitled to call on the county authority for contribution on the ground that on the expiration of the turnpike trust s. 13 came into operation. That being so, this case comes before us and seems to be concluded by the *Sheffield Case* (1). There is no material technical difference between the special legislation in that case and in this. The object was the same, to provide a special fund for the maintenance of a part of the road because of the additional burthen put on that part of the road by reason of it being within the borough dealt with by the special legislation. The case is on all fours with the present one. In that case as in this there was an expiration of the turnpike trust, in that case as in this in 1877 the road was remitted to its original character and came under the operation of the Act of 1878, which provided for its maintenance. It is said that the legislature can hardly have intended to transfer the burthen

(1) 8 App. Cas. 781. (2) 8 App. Cas. 494.

which had so long been borne by the Newton Commissioners to the county. We have nothing to do with that and have only to deal with the Act of Parliament. But I can see good reason why the Act should have been passed dealing with such a case as the present. The case falls within the terms of the Act and our judgment must be for the plaintiffs with costs.

DAY, J. This case seems to me to be concluded by authority. Sect. 13 of the Highways and Locomotive Amendment Act, 1878, has received a judicial construction in the case of *Justices of Lancaster* v. *Mayor of Rochdale* (1); and I understand that decision to be simply that the words "any road" used in that section must be taken to mean the whole as distinguished from part of such turnpike road, and consequently that, whether part of a turnpike road has or has not ceased to be a turnpike road after the 31st of December, 1876, yet so long as any other part remains turnpike road the county are not liable for the costs of any repairs under s. 13. That decision seems to me to be quite consistent with the present contention of the plaintiffs; which is, as I understand it, to the effect that this Wigan and Warrington turnpike road, so considered as a whole, and irrespective of any previous dealing with such part as passes through or lies within the Newton district, ceased to be a turnpike road by reason of the efflux in 1877 of the time within which the turnpike trust was limited; and that consequently s. 13 applies, and that, therefore, one half of the expenses incurred by the highway authority (here the plaintiffs) in the maintenance of such road shall as to every part thereof which is within the limits of any highway area (here the Newton district) be paid to the highway authority of such area by the county authority (here the defendants). I should have been prepared—bound as I am by the judicial interpretation put upon the words "any road" as used in s. 13, by the House of Lords in the case already cited—to hold that the present contention of the plaintiffs is well founded even in the absence of any further authority; but the matter seems to me to be definitively concluded in favour of the plaintiffs by the further judgment of the House of Lords in the case of

(1) 8 App. Cas. 494.

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Justices of the West Riding v. *Corporation of Sheffield* (1), which cannot be substantially distinguished from the one before us. I may add that I think the decision in the *Sheffield Case* follows logically upon the decision in the *Rochdale Case*, although no doubt the mischief contemplated and averted by the learned Lords in the former case necessarily followed upon their judgment in the latter one.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Field, Roscoe, & Co.*
Solicitors for defendants: *Ridsdale & Son.*

J. R.

June 26.

IN THE MATTER OF AN INTERPLEADER ISSUE BETWEEN THOMPSON AND WRIGHT. RICHARDSON AND ROPER APPLICANTS.

Practice—Interpleader—Indemnity to Stakeholder—Objection by Claimant indemnifying to Interpleader Issue—Order LVI., r. 2 (6).

The objection that a stakeholder has, by merely taking an indemnity from one of two rival claimants to property in his hands, disentitled himself to relief under the Interpleader Acts because he has identified himself with and must be taken to "collude" with the claimant who gave the indemnity, cannot be raised by that claimant himself, and the decisions in *Tucker* v. *Morris* (1 Cr. & M. 73) and *Belcher* v. *Smith* (9 Bing. 82) do not apply.

APPEAL from an order of Denman, J., in chambers. It appeared that there were two claimants, Thompson and Wright, to certain goods. Wright directed Richardson & Ropers, auctioneers, the applicants, to take and sell the goods. The applicants advertised the goods for sale, whereupon Thompson gave notice to them that the goods belonged to him, and that he should hold them responsible. This notice the applicants transmitted to Wright, and he instructed them to proceed to sell, and gave them an indemnity. They accordingly sold the goods, and afterwards applied to a Master for an interpleader order to try the right to the sum realized by the sale, and the application being dismissed, they appealed to Denman, J., at Chambers, who ordered an interpleader issue between Thompson and Wright to

(1) 8 App. Cas. 781.

try the question whether the sum was the property of Thompson or Wright. On appeal,

A. Charles, Q.C., for Wright, the defendant, moved to rescind the order. By taking an indemnity the applicants have disentitled themselves to relief under the Interpleader Acts: *Tucker* v. *Morris* (1). The principle is that by so doing they have identified themselves with one of the rival claimants, and, in a sense "collude" with the person giving the indemnity: see per Tindal, C.J., *Belcher* v. *Smith* (2).

R. Henn Collins, Q.C., and *English Harrison*, for Richardson and Roper, the applicants. In those cases the objection to the interpleader was not raised by the person who gave the indemnity. He cannot raise it although the opposing person may. But here Thompson makes no objection to the issue. If no express indemnity had been given to the applicants when directed by Wright to sell, an indemnity would have been implied. But it is now settled law that an auctioneer may interplead, yet he has always an implied indemnity. To reduce the indemnity to express terms can make no difference in principle. Order LVII., rules 1 and 2, have been satisfied. The applicants do not "collude" with either party within the exception in rule 2. The learned judge at chambers was satisfied that there was no collusion.

Holl, Q.C. (*H. A. Forman*, with him), appeared for Thompson, to support the order.

A. Charles, Q.C., in reply.

STEPHEN, J. This order must stand, and the appeal be dismissed with costs. The only question is whether by taking an indemnity the auctioneers have put themselves in a position from which the Court ought not to extricate them, because they have taken an indemnity? The distinction between the cases cited and this case is that there the person objecting to the interpleader was not the party to the indemnity, whereas here the person objecting is the party who gave the indemnity. I fail to see that the act of taking the indemnity identified the

(1) 1 Cr. & M. 73. (2) 9 Bing. 82.

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applicants with Wright, so as to deprive the applicants of the benefit of interpleader. Moreover, the process of interpleader saves circuity of action, for if no interpleader were allowed in this case the auctioneers would be sued by two parties at once, and the only defence to either would be the title of the other. I think the order right.

WILLIAMS, J. As I understand the facts, Thompson adopted and ratified the sale, which cannot therefore be treated by him as a wrongful act, and he claims only the proceeds. The applicants come to the Court, and say in effect that they have the money, but have no interest in it, and are willing to pay it into court, and do not "collude" with either party, and that if any question is raised by the parties they may be ordered to litigate it between themselves. Thompson might object to that, but does not, and is quite willing that the applicants should pay the money into court, and will meet Wright and there dispute with him the title to it. But Wright comes forward and contests the right of the applicants to interplead, because, as he says, they come within Order LVII., rule 2 (6), and "collude" with one of the claimants. Quite apart from the two authorities cited, the rule is intended to provide that a person professing to be impartial, and a mere stakeholder, having placed himself in a difficulty as regards one party, through having made an admission, or entered into a contract, or otherwise hampered his position, should not get himself out of the difficulty by asking the Court to help him to make the parties litigate a different question to that applying to him; but it seems to me that the real question will be properly decided in the controversy between Wright and Thompson, and the applicants have done nothing which can hamper Wright in any way. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for applicants: *Sole, Turner, & Knight.*
Solicitor for plaintiff: *J. Watson Stocker.*
Solicitors for defendant: *Bellamy, Strong, & Baker.*

J. R.

BARROW & BROTHERS *v.* DYSTER, NALDER & CO. 1884

June 26.

Principal and Agent—Sale by Brokers for Undisclosed Principal—Provision in bought and sold Notes for Settlement of Disputes by Brokers—Custom of Trade making Brokers personally liable—Evidence of—Admissibility.

A written contract made by brokers on behalf of undisclosed principals for the sale of hides provided that "if any difference or dispute shall arise under this contract it is hereby mutually agreed between the sellers and buyers that the same shall be settled by the selling brokers, whose decision in writing shall be final and binding on both sellers and buyers."

In an action against the brokers in respect of inferior hides delivered under the contract, the buyers made a claim for the breach against the brokers as principals by custom of the trade :—

Held, that evidence of a custom of the trade that a broker who does not disclose his principal is personally responsible for the performance of the contract and liable for the breach was rightly rejected, as such custom was inconsistent with the arbitration clause, which would, if the custom were incorporated, make the brokers judges in their own cause.

ACTION against the defendants as principals, and as personally responsible by a custom of trade, upon an agreement for the sale of hides to the plaintiffs, for delivering hides inferior to those contracted for; secondly, as agents, for not using due care in the purchase of hides for the plaintiffs; and, thirdly, for breach of warranty by the defendants on a sale of hides to the plaintiffs.

At the trial in London before Lopes, J., it appeared that the defendants, hide brokers in the city of London, had signed the following bought note :—

"Messrs. S. Barrow & Brothers, 18th Nov. 1881.

"We have this day bought for your account,—

35 bales per "Menelaus"
75 „ „ "Anchises"
90 „ „ "Cyclops"

200 bales dry China hides, each containing about eighty hides, shipping average about 14 and 16 lbs. each, afloat by the above-named steamers from Shanghai to London, at 8*d.* per lb. full cost, freight and insurance f. p. a. The hides to be trimmed, not to contain any lime cured, to be of fair quality, or an allowance to be made to render them equal thereto. . . .

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"Payment to be made by the buyers to the selling brokers in cash, without discount, within twenty-eight days of date of final delivery over side of each respective parcel.

"If any difference or dispute should arise under this contract it is hereby mutually agreed between sellers and buyers that the same shall be settled by the selling brokers whose decision in writing shall be final and binding on both sellers and buyers.

(Signed) "Dyster, Nalder & Co."

A sold note was also signed by the defendants.

Under the contract hides, which were for the purposes of the trial admitted to be inferior to the quality specified in the contract, had been delivered to the plaintiffs, who had paid the price. The sellers were a firm in Shanghai with a partner, A. J. Little, in London.

The defendants did not disclose to the plaintiffs the names of the sellers. The plaintiffs called witnesses to prove an alleged custom or usage of the hide trade in the city of London that when a broker does not disclose his principal in the contract, or within a reasonable time, the broker is personally responsible for the performance of the contract, and liable if there is a breach. The learned judge rejected the evidence, expressing his opinion that, inasmuch as a clause in the contract made the brokers arbitrators if any difference or dispute should arise under it, the effect of a custom rendering the brokers liable as principals to the contract would be to make them judges in their own cause, and that the custom if proved would be inconsistent with the contract and could not be incorporated with it; and that the contract on the face of it disclosed agency and was made with the sellers and not with the brokers. He accordingly directed a verdict for the defendants. Notice of motion for a new trial having been given on the ground of misdirection, and the improper rejection of evidence.

R. T. Reid, Q.C., and *Hollams*, for the plaintiffs, moved accordingly:—

Two distinct contracts arose out of the transaction in question. One was a contract of purchase and sale, the other a contract of

employment and agency. The meaning of the arbitration clause in the bought and sold notes is that if any difference or dispute should arise between the parties, viz. the buyers and sellers, it should be referred to the brokers. But the custom is annexed to the contract of employment and agency. The brokers make the contract between the buyers and sellers, but, ex necessitate rei, there must be an antecedent contract of employment between the brokers and each of their principals. On that theory only is *Humfrey* v. *Dale* (1) intelligible. The liability imposed on the defendants by the custom is analogous to that of del credere agents. See *Fleet* v. *Murton* (2), per Blackburn, J. Secondly, suppose the custom were read into the bargain there would be no inconsistency. That the buyers and sellers should agree to refer *their* disputes to the brokers is not inconsistent with a custom that if the broker does not disclose his principals he shall be personally responsible. The insertion of the words "upon the agreement" in the claim does not signify. *Fleet* v. *Murton* (2) is recognised in *Imperial Bank* v. *London and St Katharine Docks Co.* (3). [*Hutchinson* v. *Tatham* (4) and *Southwell* v. *Bowditch* (5) were also referred to.]

Sir H. James, A.G., and *Edwyn Jones*, for the defendants, were not heard.

STEPHEN, J. It has been argued for the plaintiffs that there were two different contracts; that one was a contract of employment between the plaintiffs and the defendants binding the defendants to exercise proper skill and care as brokers, and by the custom of the city of London there was annexed to that contract a clause that on any contract they made they should be personally liable if within a certain and reasonable time they did not disclose the names of their principals. Mr. Reid says that there is no inconsistency between the custom and that contract. Then it is said that another contract which the defendants made was that expressed in the bought and sold notes of the 18th of November, 1881. As to that, I thought there was some inconsistency, as

(1) 7 E. & B. 266.
(2) Law Rep. 7 Q. B. 126, at p. 132.
(3) 5 Ch. D. 195.
(4) 1 C. P. D. 100, 374.
(5) Law Rep. 8 C. P. 482.

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the learned counsel wanted to make the clause which he put into the other contract part of this contract also, but he says that the addition to the contract of employment of a clause inconsistent with one of the terms of the notes would not vitiate the contract made by the brokers by the notes. But the case appears to me in a different light. It seems to me that the bought and sold notes must be taken to be the contract between the buyers and sellers and brokers, and the effect of the custom would be to incorporate into the bought and sold notes a clause inconsistent with the clause making the brokers arbitrators. I think, therefore, that the arbitration clause will not allow the introduction of the custom, so on that short ground my Brother Lopes was right.

But another argument was advanced, which was intelligible enough. Mr. Reid said that even if the custom were written into the bought and sold notes there would be no inconsistency, for then the contract would read that if there was a dispute between the original buyers and original sellers that dispute was to be settled by the brokers as arbitrators, but if there was a dispute between the brokers and the sellers, or the brokers and the buyers, it could not be intended that the brokers should settle it themselves. But this is not the interpretation which anybody would put on the agreement except for the purpose of avoiding repugnancy, and when the question is as to admitting this custom I do not see why we should be very anxious to avoid repugnancy.

The arbitration clause seems to mean what it says: "if any difference or dispute shall arise under this contract" it is mutually agreed between the buyers and sellers that the same shall be settled by the brokers, and the brokers obviously agree to that too, because they put their names to the document. It seems to me they all three contract that the brokers are to be the arbitrators. If that is so, it is inconsistent with the idea that the brokers are themselves to be substituted for the principals. I do not think the decisions to which we have been referred come very near this case. They tend to shew that in certain instances, where there is no such clause as this arbitration clause, there is a possibility that such a custom might be introduced. The arbitration clause which creates the present difficulty was not referred

to in any of those cases. The motion must be dismissed with costs.

WILLIAMS, J. I am of the same opinion. The motion is for a new trial on the ground of improper rejection of evidence of a legal custom of the city of London. The plaintiffs put forward their claim in three different ways. First alleging that they bought of the defendants certain hides, and as part of that claim they allege that, by reason of a custom of the hide trade, the defendants became and were personally liable to the plaintiffs upon the agreement. That first claim is founded on an agreement alleged to be in writing of the 18th of November, 1881, upon which it is said the defendants became liable personally, owing to their not disclosing the names of their principals; and a breach of that contract by delivery of hides of inferior quality is alleged. Then, secondly, the plaintiffs allege that they employed the defendants as their agents for commission to buy hides, and the defendants accepted the employment, and in consideration thereof promised the plaintiffs to use due care, skill, and diligence in and about the purchase, and in and about inspecting and reporting upon the hides, and protecting the interests of the plaintiffs, but did not do so. Thirdly, the plaintiffs say that the defendants by warranting certain hides to be of a fair quality sold the same to the plaintiffs, and allege a breach of warranty and damage. All those three claims were disputed. At the trial the plaintiffs put in a contract of the 18th of November, 1881, and then proposed to give in evidence this custom, which has been over and over again brought forward in the city of London, viz., that if brokers neglect to disclose the names of their principals within a certain time, the brokers become personally liable on *the* contract. My Brother Lopes rejected the evidence on the ground that the custom was inconsistent with the scope of the contract. The argument for the plaintiffs was that there were really three contracts. One of employment by the buyers, the second of employment by the sellers, of the brokers to buy and sell for them respectively, the third a contract between the buyers and sellers, and then Mr. Reid says he does not endeavour to introduce the custom into the contract between the buyers and

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sellers, but to annex it to the contract of employment. That is all perfectly intelligible. But it seems to me that neither in the claim, nor at the trial, was there any attempt so to put the case. I am content to rest my judgment on this, viz., that on the claim as put forward my Brother Lopes was right in rejecting evidence of a custom which was inconsistent with the contract to which the plaintiffs sought to annex it.

Motion refused.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Kearsey, Son & Hawes.*

J. R.

May 26.

THE UNITED LAND COMPANY *v.* THE TOTTENHAM LOCAL BOARD OF HEALTH.

Highway, Expenses of stopping up or diverting—Right of Board to employ a Solicitor at the Cost of the Party—Highway Act, 1835 (5 & 6 *Wm.* 4, *c.* 50), *ss.* 84, 85, 101—*Public Health Act* 1875 (38 & 39 *Vict. c.* 55), *ss.* 144, 189.

The charges of a solicitor employed by an urban authority to conduct proceedings at the instance of an individual for the stopping up or diverting a highway under ss. 84, 85 of the Highway Act, 5 & 6 Wm. 4, c. 50, are not "expenses" within s. 84 of the Act, so as to be recoverable in the manner pointed out by s. 101.

Semble, that all the steps required by s. 85 to be taken for the purpose of obtaining the order of sessions, are ministerial acts which ought to be done by the surveyor of the local authority.

CASE stated by justices under 20 & 21 Vict. c. 43, s. 3.

1. The appellants were summoned before the magistrates sitting in petty sessions at Edmonton at the instance of the clerk to the respondents, the surveyors of the highways within the district which comprises the parish of Tottenham, for non-payment of three several sums of 75*l.* 6*s.* 4*d.*, 74*l.* 16*s.* 7*d.*, and 74*l.* 6*s.*, being the expenses attending the view by two justices, stopping up, diverting, or turning three several public footways in the parish, in compliance with a written notice given by the appellants to the respondents as such surveyor.

2. The following are the particulars of the charges as to one of the footways. The others were similar in character,—

	£	s.	d.
Solicitors' charges	40	1	10
Paid for fixing notices	4	4	0
Printer's charges	0	17	6
Advertisements	9	2	8
Carpenter, for boards	0	7	0
Magistrates' clerk's fees	5	2	10
Counsel's fees	4	11	6
Clerk of the peace's fees	10	16	8
Costs of taxation (by clerk of the peace)	3	17	10
	79	1	10
Taxed off	3	15	6
	£75	6	4

3, 4. The magistrates having been required so to do, stated a case which was to be treated as if separately stated in each matter.

5. The appellants are, and have been since April, 1881, the owners of an estate at Bruce Grove, Tottenham. The respondents are an urban authority under the Public Health Act, 1875 (38 & 39 Vict. c. 55), and by virtue of s. 144 of that Act execute the office of and are surveyors of the highways within their district, which includes the parish of Tottenham.

6. In December, 1881, the appellants, being desirous of diverting three several footways on their estate within the parish, requested the respondents to assent to such diversion, and to take the necessary steps to have the footways closed. After some correspondence, and after formal applications had been made and plans deposited by the appellants, the respondents passed a resolution assenting to the diversion of the footpaths, and conveyed their determination in a letter of the 1st of February, 1882, signed by Mr. Crowne, their clerk, and addressed to the appellants' solicitor,—

"Dear Sir,—I beg to acknowledge the receipt of your letter of the 28th ult. inclosing three separate applications and plans for the turning, stopping up, or diverting three several footpaths or

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highways crossing the above estate, and in reply to inform you that the same were submitted to the board at their meeting yesterday, when the proposed diversions were assented to, and I was directed to apply to the justices to view the highways proposed to be diverted.

"The board gave their asent and the above direction on the condition that the entire expense in connection with the several diversions shall be defrayed by the company."

To this letter the appellants' solicitor on the following day replied,—

"Dear Sir,—I am in receipt of your letter of the 1st inst., and in reply may say that my clients, the company, will pay the expenses in connection with the several diversions of footpaths herein."

7. Mr. Crowne, the clerk to the respondents (who is not a solicitor), thereupon instructed Messrs. Heath, Parker, & Brett, the solicitors who usually acted for the respondents, to take the steps necessary and required by the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), to be taken in such cases. Such instructions were given by Mr. Crowne in the bonâ fide belief that he had a general authority to instruct the solicitors when legal assistance was required in conducting the business of the respondents: and the instructions so given were afterwards approved and adopted by the respondents; but there was no resolution of the respondent board directing or impowering Mr. Crowne to instruct Messrs. Heath, Parker, & Brett with respect to the particular matters in question. There was at the time when the expenses hereinafter mentioned were incurred a surveyor in the employment of the respondents, appointed by them under the powers conferred on them by the Public Health Act, 1875.

8. In the course of the year 1882 and the early part of 1883, the notices, advertisements, views, and certificate of justices, and and other proceedings prescribed by s. 85 of the Highway Act, 1835, were given and had by Messrs. Heath, Parker, & Brett, in respect of each of the three footways. While these things were being done, Messrs. Heath, Parker, & Brett, as the respondents' solicitors, were in constant communication with the appellants with reference thereto. In the course of such communications

they suggested that the appellants had better prepare the plans themselves; but the appellants declined to act on this suggestion.

9. On the 12th of April, 1883, the appellants received a letter from Messrs. Heath, Parker, & Brett, asking for payment of their charges in the matter. In reply to the appellants' request for particulars, Messrs. Heath, Parker, & Brett furnished a copy of a bill of costs previously delivered by them to the respondents. [A copy of this bill of costs, amounting to 185*l.* 9*s.* 11*d.*, was attached to the case.]

10. The appellants alleged that the charges were excessive; and, after some correspondence, their solicitor on the 8th of June, 1883, communicated to Messrs. Heath, Parker, & Brett the following resolution of the appellants' board:—"The directors having again considered the question of the charges of the solicitors, Messrs. Heath, Parker, & Brett, amounting to 185*l.* 9*s.* 11*d.*, in connection with the diversion of the footpaths on the Bruce Grove estate,—Resolved, that the board cannot recognise the claim, and certainly cannot pay any amount until the account has been taxed by the proper authority, due notice of such taxation being given to the company, if liable."

On the 22nd of June Messrs. Heath, Parker, & Brett replied, as follows:—"The clerk of the peace has appointed Wednesday next, at 11 o'clock, at the Sessions House, Clerkenwell Green, to tax the costs and charges herein; and we inform you thereof as a matter of courtesy to you, and without admitting any right on the part of your clients to appear on the taxation. We have, of course, added to the bills the fees of the clerk of the peace, particulars of which you already have."

11. The bill was taxed by the clerk of the peace for Middlesex on the 26th of June, 1883. The appellants' solicitor attended the taxation, and contested the bill item by item. The clerk of the peace allowed upon such taxation 224*l.* 8*s.* 10*d.*

12. On the 29th of June, 1883, Messrs. Heath, Parker, & Brett informed the appellants' solicitor of the result of the taxation and of the amount allowed thereon: and on the 11th of July they on behalf of the respondents demanded at the office of the appellants payment of the above-mentioned sum, which the appellants refused.

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13. The respondents thereupon paid Messrs. Heath, Parker, & Brett 224*l.* 8*s.* 10*d.*, being the amount of the said bill of costs, and at the same time directed summary proceedings to be taken under s. 101 of the Highway Act, 1835, for the recovery thereof from the appellants. The complaints mentioned in the 1st and 2nd paragraphs of the case were accordingly preferred on behalf of the respondents by Crowne, and summonses issued thereon, the sums severally claimed being the apportioned amount of the costs alleged to have been incurred in respect of each of the three footways.

14. It was contended for the appellants that the respondents were not entitled to employ a solicitor for the purpose of performing the duties cast upon them as the surveyor of highways by the 85th section of the Highway Act, 1835; that the said duties were for the most part, if not wholly, ministerial, and ought to have been performed by the respondents' surveyor; that, in particular, the charges made by Messrs. Heath, Parker, & Brett on the solicitors' scale for corresponding with the respondents' clerk, attending and instructing printers, for advertisements and notices, and attending the view by the justices, were not authorized by the statute, and were therefore not "expenses" within the meaning of the 84th section, or recoverable summarily under that and the 101st section.

The justices, however, were of opinion, and found as a fact, that the employment of the solicitors by the respondents was reasonable and proper, and that the costs of such employment were "expenses" properly incurred for the purpose of the view and the stopping up, diverting, or turning of the highways.

15. It was further contended by the appellants that the said costs were not recoverable as "expenses" by the respondents, inasmuch as there was no evidence that Messrs. Heath, Parker, & Brett had been employed by the respondents to do the work charged for. The justices, however, were of opinion, and found as a fact, that Messrs. Heath, Parker, & Brett were employed by the authority of the respondents to do the work charged for.

16. The appellants further contended that many of the items in the bill were excessive and unreasonable; and, in particular that, though the diversion of the three footpaths was practically

a single operation, much of the work done in connection therewith, such, for instance, as attendance on the printer and at the view, was charged for three times over; and that they were not excluded from objecting to such charges before the justices, by the taxation of the bill and their attendances thereat. The justices, however, ruled that the taxation was conclusive evidence of the reasonableness of the charges.

17. The appellants further contended that there was no evidence of a demand of the specific sum payment whereof was stated in the several complaints to have been required. The justices, however, were of opinion that, having regard to the facts stated in par. 12 of the case, no further demand was necessary.

18. They accordingly convicted the appellants of the three offences complained of, and by three separate convictions adjudged that for the said offences they should forfeit and pay the three sums sought to be recovered, as stated in the 1st and 2nd paragraphs.

The question for the opinion of the Court was, whether, having regard to the above-mentioned contentions of the appellants, the convictions were right.

Askwith, for the appellants. The surveyor of highways has no power to delegate his authority under ss. 84, 85 of the Highway Act, 5 & 6 Wm. 4, c. 50, to a solicitor; and the urban authority under whom he acts cannot recover costs incurred by his so doing. The appellants being desirous of stopping up certain highways, gave the notice required by s. 84 of the Highway Act, which enacts that, if any party other than the vestry shall be desirous of stopping up, diverting, or turning any highway, he shall by a notice in writing require the surveyor to give notice to the churchwardens to assemble the vestry and to submit to them the wish of such person; and, if the vestry shall agree to the proposal, the surveyor shall apply to two justices to view the same; and the expenses attending such view and the stopping up, diverting, or turning such highway, shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable by this Act [s. 101]; and the said surveyor is hereby required to make such application. The

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mode of proceeding is pointed out by s. 85. The *surveyor*, by direction of the justices, is to affix a notice at the place and by the side of each end of the highway from whence the same is proposed to be turned, diverted, or stopped up, and also to insert the same notice in one newspaper published or generally circulated in the county where the highway so proposed to be diverted, &c., shall lie, for four successive weeks next after the justices have viewed such highway, and to affix a like notice on the door of the church of every parish in which the highway or any part thereof shall be, on four successive Sundays next after the making such view; and, the notices having been so published and proof thereof having been given to the satisfaction of the justices, and a plan having been delivered to them at the same time particularly describing the old and the proposed new highway by metes, bounds, and admeasurement thereof, the justices shall certify under their hands the fact of their having viewed the highway &c.; and the certificate of the justices, together with the proof and plan so laid before them, shall be lodged with the clerk of the peace, and shall, at the quarter sessions next after the expiration of four weeks from the day of the certificate having been so lodged with the clerk of the peace, be read by him in open court, and inrolled amongst the records of the court. The order for stopping up or diverting the highway is to be made by the court of quarter sessions: s. 91. By s. 144 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), the urban authority is substituted for the surveyor of highways under the Act of 1835 (1). All the Acts, therefore, which were by s. 85 of the last-mentioned

(1) Sect. 144 enacts that "every urban authority shall within their district exclusively of any other person execute the office of and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities, or duties, are or may be inconsistent with the provisions of this Act: every urban authority shall also have, exercise, and be subject to all the powers, authorities, duties, and liabilities which by the Highway Act, 1835, or any Act amending the same, are vested in and given to the inhabitants in vestry assembled of any parish within their district. All ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint."

Act to be done by the surveyor of highways are now to be done by the substituted authority, or by the surveyor appointed by them under s. 189 of the Act of 1875; and they are all ministerial acts, none of them involving any difficulty so as to need legal assistance. Their surveyor having without any instructions from them thought fit to employ a firm of solicitors to do that which it was his duty to do himself, it is not competent to the board to charge the appellants with the expenses so needlessly incurred. Besides, many of the charges are in themselves unreasonable and extortionate: and, even assuming that the clerk of the peace was, under s. 249 of the Act of 1875 (1), the proper person to tax the bill, his taxation is only primâ facie evidence of the reasonableness of the amount, but not of the legality of the charges: and the appellants are not to be prejudiced by their having attended the taxation; neither are they bound by the finding of the justices that the taxation was conclusive evidence of the reasonableness of the charges.

F. Turner, contrà. The case is concluded by the justices finding *as a fact* that the employment of the solicitors by the respondents was reasonable and proper, and that the costs of such employment were "expenses" properly incurred for the purpose of the view and the stopping up the highways in question. It is only necessary to look at the terms of ss. 84 and 85 of the Act of 1835, to see the difficulties which might arise in carrying out so important a matter as the closing of a highway which has been long enjoyed by the public: and, as there were here three highways to be stopped up or diverted, it was necessary that there should be three orders, the highways not being so connected together as that they could not be separately stopped or diverted without interfering the one with the other, so as to justify their being all included in one order, under s. 86. Besides, the

(1) Sect. 249 enacts that "on the application of any local authority whose accounts are required by this Act to be audited, to the clerk of the peace of the county in which the district of such authority is wholly or in part situated, the said clerk or his deputy shall tax any bill due to any solicitor or attorney in respect of the legal business performed on behalf of such authority; and the allowance of any sum on such taxation shall be primâ facie evidence of the reasonableness of the amount, but not of the legality of the charges."

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correspondence set out in par. 6 of the case shews that the appellants agreed to defray the entire expenses connected with the several deviations proposed. Sect. 144 of the Public Health Act, 1875, authorizes the board to employ whomsoever they please to carry out the business.

HAWKINS, J. I am of opinion that this appeal should be allowed. The orders were made for the payment of these charges by the appellants as though they were expenses incurred under s. 84 of the Highway Act (5 & 6 Wm. 4, c. 50). That section provides that where the vestry deem it expedient that any highway should be stopped, diverted, or turned either entirely or reserving a bridleway or footway along the whole or any part or parts thereof, the chairman of such vestry shall by an order in writing direct the surveyor to apply to two justices to view the same, and shall authorize him to pay all the expenses attending such view and the stopping up, diverting, or turning such highway either entirely or subject to such reservation as aforesaid, out of the money received by him for the purposes of the Act: provided that if any other party shall be desirous of stopping up, diverting, or turning any highway, he shall by a notice in writing require the surveyor to give notice to the churchwardens to assemble a vestry and to submit to them the wish of such person; and, if the vestry shall agree to the proposal, the surveyor shall apply to the justices as last aforesaid for the purposes aforesaid: and then it goes on to provide that in such case the expenses aforesaid shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable under the Act. And s. 85 provides, amongst other things, that the surveyor shall affix certain notices on the highway proposed to be stopped or diverted and also on the church door, and to publish them in a newspaper, and to do certain other things. Here three several highways were proposed to be dealt with. The respondents, the urban authority, were applied to and they assented to the proposal of the appellants to stop up these three highways, on the condition that "the entire expense in connection with the several diversions" should be defrayed by the appellants. This condition was accepted by the appellants; and

thereupon the "clerk to the board," assuming that he had a general authority so to do, instructed the solicitors who usually acted for the board to take the steps necessary and required by the Highway Act. Those gentlemen accordingly prepared the notices and plans required by s. 85, attended the justices on the view, and obtained and lodged their certificate with the clerk of the peace and afterwards sent in their bill of costs, which was taxed by the clerk of the peace, the amount allowed by whom on such taxation was paid to them by the respondents. The question is whether these are "expenses" within s. 84 of the Highway Act. I am of opinion that they are not. The expenses contemplated by that section are those which are incurred *by the surveyor* in preparing, affixing, and publishing the notices and plans mentioned in s. 85 according to the directions therein contained, attending the justices at the view, and obtaining their certificate and lodging it with the clerk of the peace,—all which duties are merely ministerial. There is nothing to require the advice or intervention of a solicitor, as in the case of a legal action or proceeding. I am far, however, from saying that the appellants might not be liable to an action on contract, if they have bound themselves by agreement to pay these costs. All I say is that they are not such expenses as are within the contemplation of s. 84 of the Highway Act. But it was said that s. 144 of the Public Health Act, 1875, gave the respondents power to employ the solicitors. I do not so read it. That section transfers to the urban authority all the powers, duties, and liabilities of surveyors of highways, and provides that "all ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor of the urban authority, or by or to *such other person as they may appoint.*" By s. 189 of the Public Health Act, 1875, the urban authority are to appoint fit and proper persons to be medical officer of health, *surveyor*, inspector of nuisances, clerk, and treasurer, and also collectors and such other officers and servants as may be necessary for the efficient execution of the Act. They have appointed a surveyor. There is nothing in either Act to shew that it was ever contemplated that they should employ a firm of solicitors to do the work of one of their paid officers. For these reasons, I am of opinion

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that the justices were wrong, and that this appeal should be allowed.

SMITH, J. The question submitted to us is whether the convictions (or orders) of the justices in this case were right,—whether the three several sums which the appellants were required to pay are "expenses" within the meaning of s. 84 of the Highway Act (5 & 6 Wm. 4, c. 50), for non-payment of which they are liable to be summarily dealt with under s. 101. It is not necessary for us to determine whether or not the respondents may have a cause of action against the United Land Company for money paid at their request. All I mean to say is, that the moneys, payment of which is sought to be enforced in this summary way are not "expenses" within s. 84. When closure is wanted by the inhabitants, the surveyor is to be put in motion by the order of the chairman for that purpose, and he (the surveyor) is to pay all the expenses attending the view and the stopping up, diverting, or turning the highway, out of the moneys received by him for the purposes of the Act. If any other party is desirous of stopping up or diverting the highway, he is to give notice to the surveyor, and the surveyor is to call upon the churchwardens to assemble the vestry, and to apply to the justices "for the purposes aforesaid;" and in such case, that is, in the case of a stopping up or diverting at the instance of a third party, "the expenses aforesaid" shall be paid "to such surveyor by the said party," and recoverable as under s. 101. And then s. 85 proceeds to describe what are the steps to be taken (by the surveyor) for obtaining a view by the justices and their certificate, upon which the court of quarter sessions is to act. I see nothing in the Highway Act to indicate any intention on the part of the legislature that the surveyor is to be at liberty to obtain independent advice or assistance from a solicitor at the expense of the party; nor do I see any necessity for professional assistance; all the acts required by s. 85 to be done being ministerial acts of the simplest possible nature. The urban authority, in whom all the powers of the surveyor of highways are now vested by s. 144 of the Public Health Act, 1875, have under s. 189 appointed a surveyor, and we may assume that he is paid a salary. Sect. 144, which

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has been relied on, clearly does not justify the employment of a solicitor to do *his* work. As to the taxation of costs by the clerk of the peace under s. 249, that applies only where the local authority are asking for a taxation for the purpose of audit. I entirely agree with my Brother Hawkins that the sums which the justices have ordered the appellants to pay are not "expenses" within s. 84 of the Highway Act, and that our judgment must be for the appellants, with costs. It is suggested that the money has been paid; if so, it should be refunded.

Judgment for the appellants.

Turner, asked leave to appeal, but the Court refused it.

Solicitor for appellants: *H. Smith.*

Solicitors for respondents: *Heath, Parker, & Brett.*

J. S.

[IN THE COURT OF APPEAL.]

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Dec. 21.

THE OCEAN STEAMSHIP CO. *v.* ANDERSON, TRITTON & CO.

Ship—General Average—Towage—Contract to tow Ship in Distress for limited Time—Remuneration payable whether or not Ship and Cargo saved.

A contract for the towage during a limited time of a laden ship in distress, entered into by her master for the common benefit of the adventure, may, if the ship and her cargo are ultimately saved by the towage, give rise to a general average contribution, even although the remuneration agreed upon in the contract for the towage is thereby made payable by the shipowner, whether or not the ship and her cargo are ultimately saved.

ACTION by owners of ship against owners of part of the cargo to recover a general average contribution.

In the month of May, 1880, the plaintiffs' steamship, *Achilles*, was lying in the River Yangtze, off Hankow, in China, with her head up the stream, and was taking on board a cargo of tea. Her loading having been completed on the 1st of June, on the following morning she was cast off the hulk to which she had been moored, and began to turn round in the river for the purpose of prosecuting her voyage. She had proceeded about one hundred yards towards the centre of the river, when suddenly she grounded upon a bank. She immediately heeled over very

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heavily to port, so much so that her port deck was within six inches of the water, although when she left her moorings she had a clear side of more than ten feet. Endeavours were made by her captain to get her off the bank, her engines being worked first full speed astern and then ahead, and they were kept continually working ahead and astern as much as possible, but without any effect in moving the ship. The bank upon which the *Achilles* had grounded was formed of shifting sand, and a current of four or five knots an hour was running: the current was causing small whirlpools, and was of the kind known in China by the name of "chow-chow" water. At some distance below the *Achilles* several large steamers were moored in the river for the purpose of obtaining cargoes of tea. In the position in which the *Achilles* then was, she was in imminent danger, first, of capsizing altogether; secondly, of running foul of the steamers moored below her; and, thirdly, of grounding upon the bank of the river. Notwithstanding these dangers, efforts were made for three hours by the working of her own engines to get her off the bank of sand; but it was then reported to the captain by the engineer that the engine could not continue to move except at intervals, the injection pipe being choked, and there being danger of bursting the condenser. During all this time the *Achilles* was moving with the bank of sand. Her captain (who had previously refused assistance), seeing the increasing danger from the drifting, which became more rapid than at first, and perceiving that she was getting closer to the steamships moored below and more into the bank of the river, at the request of the pilot on board signalled to a steamship named the *Shanghai* for assistance. The *Shanghai* belonged to the China Navigation Company, and at the time of the accident was moored to a hulk. Accordingly she left her moorings and proceeded into the stream about 300 or 400 yards immediately above the *Achilles*, and there dropped an anchor. The captain of the *Achilles* then signalled to the *Shanghai* to lower a boat, and thereupon the *Shanghai* dropped a boat astern with the aid of a rope until she was within about sixty feet of the *Achilles*. The "chow-chow" water was then so strong that it was dangerous to allow a boat to drop nearer the *Achilles*, and then endeavours were made to heave a

line to the boat in order that the towing hawser might be secured, and ultimately the efforts in that respect were successful. The boat then returned to the *Shanghai*, and the men on board that ship attached a hawser to the rope from the *Achilles*, and by that means the *Shanghai's* hawser was pulled on board the *Achilles*. It was taken through the hawse-pipe and secured to her fore-mast. The *Shanghai* then commenced to tow the *Achilles*, and continued her efforts for about an hour and a half, but she was unable to move the *Achilles*. During the towing the position of the bank of sand shifted more astern, and the leverage from the current on the fore end of the ship greatly increased. The hawser of the *Shanghai* then snapped, and the *Achilles* made three rapid semi-circles, cleared herself of the bank of sand and of the "chow-chow" water, and steamed down the river to Woosung upon her voyage to London. By the snapping of the hawser no damage was done to the *Achilles*, but the *Shanghai* was injured to the extent of 37*l.* 10*s.* At the time when the captain of the *Achilles* signalled for assistance, there was no opportunity of communicating with those on board the *Shanghai* as to the terms upon which the services were to be rendered: no boat could get from or to the *Achilles* for any purpose whatever. The gross registered tonnage of the *Achilles* was 2359 tons, and of the *Shanghai* 3088 tons. The effect of the towing by the *Shanghai* was to hold the head of the *Achilles* in one position, and thereby to allow the water to get under her bottom, and to wash the sand away. The China Navigation Company and the China Merchants Company were both steamship companies trading on the River Yangtze, and they alone possessed paddle steamers of sufficient power to be capable of assisting large ocean-going steamers in distress on the river. By arrangement between the two companies, they had agreed that for assisting vessels in distress for any period of time not exceeding twenty-four hours, and whether the services rendered were beneficial or not, they would make an uniform minimum charge of 10,000 taels, in addition to the cost of repairing any damage sustained by the towing vessel, or her cables, hawsers, &c., and the two companies had agreed to divide the sum earned. The existence of this agreement, and the amount which the two companies had agreed to charge for assisting another vessel, were

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known to those persons who were in the habit of trading upon the Yangtze river, and the captain of the *Achilles*, at the time when he signalled to the *Shanghai* for assistance, was aware that this sum was charged by the two companies. The ocean-going steamers were not capable of rendering so much assistance as the *Shanghai*. There were in the river at Hankow at that time two other river steamers, both belonging to the China Merchants Company, and if either of those steamers had been available for rendering assistance at the moment, their charge would have been the same as that made by the *Shanghai*, but the latter vessel alone was ready at the time. Upon reaching Woosung, four days after the services had been rendered, the captain of the *Achilles* signed the following agreement, which had already been signed by the captain of the *Shanghai*:—

"Agreement made this 2nd day of June, 1879, between Charles Anderson, master of the steamship *Achilles*, for and on behalf of the said steamship and for and on behalf of the owners thereof, of the one part, and W. Webb Bowen, master of the steamship *Shanghai*, for and on behalf of the last-mentioned steamship, and for and on behalf of the owners thereof, of the other part: Whereas, the said steamship *Achilles* being now aground at or near Hankow, and requiring immediate assistance to get her off, the party hereto of the first part hath applied to the party hereto of the second part to render him such service as is hereinafter mentioned, which the said party hereto of the second part hath agreed to do upon the terms hereinafter contained.

"Now it is hereby agreed as follows, namely:—

"1. That for the consideration hereinafter mentioned the said party hereto of the second part shall use his best endeavours to get the *Achilles* off by towing.

"2. That such towage service shall not exceed twenty-four hours, after which the said party hereto of the second part with his said steamship may be at liberty to leave the *Achilles* whether she be afloat or not, and should the *Achilles* be towed off the ground in less than twenty-four hours and safely anchored, such towage service shall be considered complete, and the said party hereto of the second part with the said steamship shall be at liberty to leave her.

"3. That in consideration of the above service, and whether the *Achilles* be towed off or not, the said party hereto of the first part shall pay to the said party hereto of the second part the sum of 10,000 Shanghai taels by an order on the agents of the *Achilles* payable on demand, or in such other way as may be approved of by the said party hereto of the second part, and also shall pay for or make good all damage which may be occasioned to the *Shanghai*, her tackle, cable, hawsers, boats, or gear, in consequence of or in the course of the rendering of such towage service.

"4. That this agreement shall be binding so far as regards the said party hereto of the first part upon the *Achilles* and upon the owners thereof."

It was suggested that at the time when the services were rendered by the *Shanghai*, her captain did not intend to charge the owners of the *Achilles* any sum for them.

By an average adjustment the sum of 10,000 taels, with 250 taels commission, was represented by the sum of 2631*l.* 18*s.* in English money, and the amount payable for the repairs of the *Shanghai* and other expenses brought up the sum chargeable as general average to 2691*l.* 19*s.* 6*d.* By the apportionment the *Achilles* was valued at 31,000*l.*, the cargo shipped at Hankow was valued at 137,750*l.*, and the freight at 6000*l.*, these sums making in all 174,750*l.*; and by way of contribution the *Achilles* was to pay 477*l.* 10*s.* 11*d.*, the cargo 2122*l.*, and the freight 92*l.* 8*s.* 7*d.*, these sums making the requisite sum of 2691*l.* 19*s.* 6*d.* The defendants were owners of 2845 half chests of tea, of the value of 10,554*l.*, and their share of the general average loss as adjusted was 162*l.* 11*s.* 7*d.*, which sum this action was brought to recover.

The action came on for trial before Cave, J., at Guildhall, in December, 1882, and in answer to questions put by the learned judge the jury found that the captain of the *Achilles* signalled to the *Shanghai* to come to his assistance knowing her terms, that under the circumstances it was a reasonable course for the captain to pursue, and that the sum of 10,000 taels was a reasonable sum to pay for the services, which were beneficial to the ship. The verdict was accordingly entered for 162*l.* 11*s.* 7*d.*, less an amount paid into court, and the learned judge gave judgment for that amount.

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The Queen's Bench Division (Grove, Lopes, and Mathew, JJ.) entered judgment for the defendants upon the ground that there was no reasonable evidence of the agreement sued on. The plaintiffs appealed.

Nov. 21, 23, 24. *H. Matthews, Q.C.*, and *Gainsford Bruce* (*H. D. Greene* with them), for the plaintiffs. There was evidence that the captains of the *Achilles* and the *Shanghai* entered into an agreement, whereby the former ship was to be towed by the latter during a specified time. The captain of the *Achilles* had authority to bind his owners, the plaintiffs in the present action, by this agreement; for his ship was in great danger, and the object of the agreement was to rescue her from that danger. Under these circumstances the agreement was a contract for salvage services, and gave rise to a general average contribution by the ship *Achilles*, her freight, and her cargo; for extraordinary expenditure incurred for the benefit of the whole adventure is chargeable against all the subjects in jeopardy saved by the expenditure. This was the view of Lord Blackburn, then Mr. Justice Blackburn, in *Kemp* v. *Halliday* (1); and his judgment was affirmed in the Exchequer Chamber (2). Money paid for salvage services is subject to general average contribution: *Birkley* v. *Presgrave* (3): that is a decision directly in point for the plaintiffs. And remuneration for salvage services is recoverable by action in a court of common law, and the amount may be ascertained by the verdict of a jury: *Newman* v. *Walters* (4). That case shews that the jurisdiction over contracts for salvage services is not confined to Courts of Admiralty, and very strongly supports the contention for the plaintiffs.

[BRETT, M.R. If this is a towage contract, the question will be whether the captain of the *Achilles* had authority to enter into it: it cannot be turned into a valid salvage agreement merely because the ship was subsequently saved, and the services were ultimately successful.]

If the agreement can be upheld from any point of view, the

(1) 6 B. & S. 723, at pp. 746, 747 34 L. J. (Q.B.) 233, at p. 242.
(2) Law Rep. 1 Q. B. 520; 6 B. & S. 757; 35 L. J. (Q.B.) 156.
(3) 1 East, 220.
(4) 3 B. & P. 612.

plaintiffs will be entitled to recover. *Newman* v. *Newman* (1) shews that a contract may be good in part and void in part. The agreement entered into was the best which the captain of the *Achilles* could make at the time when she was in distress, and therefore it was binding as a salvage agreement: *The True Blue.* (2) The reasoning of the Court in the case last cited goes the full length for which the plaintiffs contend; the sum agreed upon would have been recoverable by the owners of the *Shanghai* even if the services rendered had not contributed to the safety of the *Achilles.* Further, the jury have found that the sum of 2631*l.* 18*s.* was a reasonable remuneration for the services rendered, and even if no agreement by the captain of the *Achilles* to pay it could be proved, the plaintiffs would be entitled to recover from the defendants a contribution in respect of it. The defendants' counsel may rely upon *The Pyrennee* (3), as shewing that a salvor cannot compel the owner of the ship to pay what is due as salvage from the owner of the cargo, and therefore that the payment by the plaintiffs was voluntary and void as against the defendants; but in that case a suit had been entered against the vessel herself in the Court of Admiralty, and its principle does not apply to the present facts.

A. Cohen, Q.C., and *Gorell Barnes*, for the defendants. The agreement for towage relied upon was not made by the master of the *Achilles*, and if it was made in point of fact, it was made by him without authority. The agreement alleged in the present case was unreasonable, and would have been set aside in the Admiralty Division, for the question of reasonableness is a question for the Court: *The British Empire* (4); *The Medina.* (5) These cases shew that the fact of inability to obtain assistance elsewhere does not make the agreement reasonable. The agreement was inequitable, because by its terms the *Shanghai* was bound to tow for only twenty-four hours; it was not a salvage contract, because the money was to be paid, although the vessel should not be saved. The captain of the *Achilles* had no authority to make the agreement, and her owners, the plaintiffs, were liable

(1) 4 M. & S. 66.
(2) 2 Wm. Rob. 176.
(3) Bro. & Lush. 189.
(4) 6 Jur. 608.
(5) 1 P. D. 272; on appeal, 2 P. D. 5.

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for nothing; for when an agent exceeds his authority, his principal is not bound at all: *Baines* v. *Ewing*. (1) In the present case the remuneration was not measured with reference to the existing circumstances; the jury have only found that the agreement was reasonable for the master to enter into. If this agreement was in its inception a towage agreement, its nature cannot be altered by subsequent events, and it cannot be turned into a salvage agreement. It may be said for the plaintiffs that the services rendered were of the nature of salvage services; but there was an express agreement for towage, and therefore no implied agreement for the performance of salvage services can exist. The principle on which salvage services are remunerated, as stated by Earl Cairns, L.C., in *Aitchison* v. *Lohre* (2), has no application to this case. In a proper case of salvage the cargo would contribute according to its true value: *The Peace* (3); but the contract being for towage, no action for contribution can be maintained, because the owner of a ship is a bailee and a trustee for the owner of the cargo, and cannot take up a position of hostility towards him, although it may be admitted for the defendants that in case of necessity the owner of a ship, if he cannot communicate with the owner of the cargo, may bind him by payment. *The Pyrennee* (4) is a direct authority against the maintenance of the plaintiffs' claim.

H. Matthews, Q.C., in reply. Salvage services must be paid for, even although the ship and the cargo are not directly saved thereby: *The E. U.* (5)

[BRETT, M.R. That decision belongs to a peculiar class of cases which were dealt with in the Court of Admiralty.]

But a general average contribution can always be enforced in a court of common law, even when it is claimed by one shipper of goods against another: *Dobson* v. *Wilson*. (6) Any expense reasonably incurred by the captain for the benefit of the ship and her cargo may be charged against them both. The master of a ship may contract with the master of a tug to tow his vessel; but

(1) Law Rep. 1 Ex. 320.
(2) 4 App. Cas. 755, at pp. 766, 767.
(3) Swabey, 115.
(4) Bro. & Lush. 189.
(5) 1 Spinks, 63.
(6) 3 Camp. 480.

if circumstances of peril arise, the contract of towage may become a contract of salvage. In the present case the ship, the freight, and the cargo were saved by one transaction, and therefore the expenses incurred in that transaction were general average, to which they all must contribute: *Moran* v. *Jones*. (1) The remuneration paid under the towage contract is an extraordinary expense falling within the definition of general average given in *M'Andrews* v. *Thatcher*. (2) At the time of the towage the *Achilles* and her cargo were exposed to a common peril, and a community of interest existed between them; therefore nothing in the case last cited (which is referred to in 1 Parsons on Shipping, book 1, ch. 9, p. 397, note) is adverse to the plaintiffs' claim in the present action. The *Achilles* was aground when she was towed by the *Shanghai;* and to heave off a stranded vessel is a general average act: Baily on General Average, p. 76. At all events, the contract for towage, even if it cannot be deemed a contract for salvage, was entered into for the common benefit of the adventure, and therefore gave rise to a general average contribution.

Cur. adv. vult.

Dec. 21. The following judgments were delivered:—

BRETT, M.R. This action was brought by the owners of the ship *Achilles* against the owners of part of the cargo for a contribution by way of general average. It was tried before Cave, J., and a jury. The circumstances given in evidence were that the plaintiffs' ship had been lying at Hankow taking tea on board, and that when she had taken in her cargo, she moved out into the river to proceed to sea, but that while she was turning in the river she went on to a bank of sand: it is obvious that the river is dangerous, and with a strong current running the ship and the cargo were undoubtedly in considerable peril. The captain of the *Achilles* signalled to another ship to come to his assistance. That other ship was the ship of other owners, and she did come to the assistance of and towed the *Achilles* so that she got off the bank of sand. It is clear that the *Achilles* was thereby saved in all probability, for whilst she was on the bank she was in great

(1) 7 E. & B. 523. (2) 3 Wal. (Sup. Court U.S.) 347, at p. 365.

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danger, and when she was off the bank she was safe. There was an agreement, which was well known to exist, that in that river no assistance should be rendered to ships in distress and no services should be given to them by way of salvage for less than £2500. That appears a very large sum, no doubt, when it is recollected that it is to be paid whatever the service may be, and whatever the size of the assisted ship may be—although all the ships are probably very much of a size—but the fact of such an agreement being made amongst men of business is conclusive to my mind to shew the unusual peril of that river, because the large amount is an indication not only of the danger into which a ship may get by running aground, but also of the danger to the ship which is called upon to assist, and when it is considered that in that river almost all the vessels are laden with heavy cargoes, or at least are engaged in large transactions for the carriage of goods, it is very questionable to me whether although the sum is large, it can in any possible view be said to be unreasonable. Now the captains of both ships were aware of this agreement. The captain of the *Achilles* stated that he knew of the agreement and intended to act upon it, that is to say, he intended that if the other ship should come to help his own, the assistance should be paid for according to the terms of the agreement. It is suggested that the captain, who went to the assistance of the *Achilles*, did not intend to make any charge: certainly he has never said so. He gave no indication that he did not mean to act upon the agreement. Upon a signal being made to him to assist he went to assist. He was using his owners' property and not his own. He was the agent of his owners, and he had no right without adequate remuneration to risk the ship of his owners and the cargo entrusted to those owners. He had no right to put them into considerable jeopardy upon the terms of rendering the assistance without compensation. Upon this fanciful suggestion as to intentions of one of the captains, the jury were asked whether there was an agreement, and they said that there was; and if I had been one of the jury, I should have come to the same conclusion. I should have thought it impossible to believe that the captain of the assisting vessel could have intended to commit a breach of duty against his owners, and to expose their ship and

her cargo to great risk upon the terms that they were to get no remuneration, whatever might happen. I do not believe that he intended to commit a breach of duty, and I apprehend that the jury were of the same opinion. But I may go further and say that if he did intend to assist the *Achilles* without remuneration, he gave no indication of his intention. He was signalled to assist her, it being the intention of those who signalled for him that he should be paid. He went and he did not make the smallest intimation that he was not going upon the only terms upon which as against his owners he was entitled to go. And even if he had had it in his mind to go without remuneration, he ought not to be allowed to say as against his owners that he had been guilty of a breach of duty towards them. The jury have found that there was an agreement, and they had before them the fact that four days afterwards the captain of the *Shanghai* signed a document shewing that there was an agreement. I entirely agree with the verdict of the jury.

There was therefore a contract. But the nature also of that contract was disputed. Was it a salvage contract? It was urged that if it was a salvage contract, there must be contribution. But it was urged for the defendants that it was a towage contract, and therefore that there could be no contribution by way of general average. Now the 2500*l.* was to be paid for towage during a certain number of hours, and whether she was towed off or not, and whether she was saved or not. Therefore it was not a salvage contract: it was a towage contract. And that raises the question whether upon that towage contract a general average contribution can now be claimed. It is not enough to say that the captain of the *Achilles* made a contract: the action is brought on the ground that the owners have made a general average sacrifice, that is, that they have been put to a general average expenditure. But the owners of this ship, the plaintiffs, would not have been put to a general average expenditure, unless the contract made by the captain was binding upon them: if he made a contract which under the circumstances was not binding upon them, they could not force upon the defendants a general average contribution by volunteering to pay to the owners of the *Shanghai* that which they were not bound to pay. Therefore I must consider

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whether the towage contract made by the captain of the *Achilles* bound his owners, the plaintiffs. A captain cannot bind his owners by every towage contract which he may think fit to make: it is binding upon them only when the surrounding circumstances are such as to render it reasonable to be made, and also when its terms are reasonable. In the present case, that the circumstances were such as to entitle the captain to enter into a towage contract, cannot be doubted; they were such as would have entitled him to do something more, namely, to make a salvage agreement. Then is the amount unreasonable? That again would be a question for the jury. Were the circumstances such as to make it reasonable for the captain of the *Achilles* to agree to pay 2500*l.* for towage during twenty-four hours, that amount to be paid whether the ship was got off or not? The jury thought that they were: they took into account the enormous value of the two vessels: the risk was great: they did not think that the arrangement by the companies was unreasonable. They came to the conclusion, that the sum of 2500*l.*, although it was large, was not unreasonable. I cannot say that the verdict upon that point was wrong. Can this towage agreement made by the captain on behalf of his owners give rise to a general average contribution on the part of the owners of the cargo? It is not every towage contract that can give rise to a claim of that kind. The proposition as to general average is, that wherever under extraordinary circumstances of danger to both ship and cargo a voluntary sacrifice of money is made, in order to save both ship and cargo, by the expenditure of which both ship and cargo are saved, the person who has made the voluntary sacrifice is entitled to call upon the others, whose property has been saved by the voluntary sacrifice made on their behalf, as well as on his own, for general average contribution. Does this agreement fall within that proposition? It fulfils every part of it. There was extraordinary danger to both ship and cargo: there was a voluntary sacrifice of money by entering into a contract for the purpose of saving both ship and cargo. By that voluntary expenditure made under the contract, both ship and cargo were saved. I do not know of any authority which lays down that under circumstances like these a towage contract is not the subject of a general average contribution. In my

judgment this towage contract gives rise to a claim for general average contribution by the shipowners against the cargo-owners.

This last point was not taken in the Divisional Court, and it was not taken in this Court until the reply: nevertheless, we are bound to decide it. The learned judges in the Queen's Bench Division were of opinion, notwithstanding the verdict of the jury, that there really was no contract in this case, and therefore that there was no liability upon the shipowners to pay the 2500*l.* If that were true, of course the payment would be merely voluntary on their part, and would not entitle them to claim any amount from the defendants. But the learned judges could come to that conclusion only upon the ground that the verdict of the jury was against the weight of evidence: with great deference I cannot agree with them, and I think that the verdict was reasonable and safe. On the whole I have come to the conclusion that the plaintiffs are entitled to judgment.

BAGGALLAY, L.J. I am of the same opinion. It appears to me that four questions are to be considered in this case. The first is, was an agreement in fact entered into between the captain of the *Achilles* and the captain of the *Shanghai*? The second is, was it a reasonable course for the captain of the *Achilles* to pursue, to enter into that agreement? The third is, whether the terms of that agreement were reasonable? And the fourth is, whether the expenditure incurred pursuant to that agreement was under the circumstances of the case justifiable for the purpose of saving the ship and her cargo? It appears to me that all those four questions must be answered in the affirmative. The first three were substantially answered in the affirmative by the jury before whom the action was tried. They found that when the captain of the *Achilles* signalled the *Shanghai*, he knew the terms upon which assistance would be rendered by her. They found in the next place, that was a reasonable course for him to pursue under the circumstances in which he was placed, and to which I need not allude again, as they have been spoken to by the Master of the Rolls. And, thirdly, they have found that the 2500*l.* was a reasonable charge under the circumstances to make for the services rendered, the *Achilles* and her cargo being valued at not

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very much less than 200,000*l.*, and the vessel giving the assistance being of a large size, and being exposed to great danger in undertaking the duty. I see no reason to dissent from the views taken by the jury so far as regards the three questions submitted to them. I entirely concur in the conclusion at which they have arrived.

The remaining question is whether the expenditure was justifiable for the purpose of saving the ship and her cargo. This appears to me to be substantially answered by the findings of the jury, for, in point of fact, the ship was in very great danger. The service was rendered by the *Shanghai* to the *Achilles* at great risk to herself. Not only was the ship, but also her cargo was in danger at the time. It appears to me, therefore, that all the circumstances occurred necessary to render the expenditure a subject for general average contribution.

BOWEN, L.J. I am of the same opinion. The first question is whether a contract was in fact made by the captain of the *Achilles*. The Queen's Bench Division came to the conclusion that there was no contract of that kind. I cannot think that if the admission had been made in the court below to which the counsel for the defendants were driven in the course of the argument, the Court would have come to that conclusion. There was a well-known agreement on the river as to the terms upon which such services as those which have been rendered should be rendered. It was an agreement proved at the trial to be known to the captain of the vessel which got on the bank of sand and which invoked the assistance of the salvors. At the time when the captain of the vessel which was in distress signalled for assistance, he knew that according to the arrangement which was familiar to all those on the river, he or his owners would have to pay for the assistance if it should be given. It was admitted in the course of the argument by the defendants' counsel, that there was no private understanding between the two companies, which respectively owned the vessel on the bank of sand and the vessel which got her off, that the vessel which was the salvor should render services gratuitously, and the vessel saved should be discharged, so to speak, from the burden of this general understanding; and all

that could be said at the end of the argument was that, although everybody else in the river might understand that the services about to be rendered by the saving ship to the ship in distress were to be paid for, the captain of the saving ship, at the time when he came to the rescue, had in his mind an idea, wholly unjustified, that his owners would not charge for the assistance which his ship was about to render. If he had communicated that impression of his own mind to the captain of the other ship which was invoking the assistance, it might have been said with some plausibility that the service was rendered upon the terms of its not being paid for; but the captain of the saving ship confined his erroneous impressions within his own breast, and it seems to me that his thoughts about the terms to be exacted by his owners for the service which he was about to render with their vessel and not with his own, were wholly immaterial, inasmuch as they were not communicated to and acted upon by the captain of the ship to be saved. I think, therefore, that there was ample evidence upon which a jury could find that there was a contract.

Next I come to the question, what is the nature of the contract? For the reasons which have been given by the Master of the Rolls, I think that this is a towage contract. Did this towage contract bind the owners of the *Achilles?* Certainly it could not affect the owners of the cargo, unless it was made in such a manner as to bind the owners of the ship. I think that the findings of the jury were right, and it is impossible to set them aside. The jury came to the conclusion that the contract was made, and that, under all the circumstances, it was not unreasonable. I think that it was a contract for a large sum, but really we have not to decide that. The jury were the tribunal of the country to decide the matter, and I do not think it possible to say that their verdict ought to be disregarded by the Court, simply because we may feel a little doubt whether the sum fixed upon as the minimum, at which services should be rendered to vessels in distress, is not too large. The contract bound the owners of the *Achilles:* it was a contract for expenditure made by the captain, when his vessel was in distress and

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when the cargo on board was in imminent danger: that expenditure was a voluntary sacrifice: it seems to me to have all the elements necessary to constitute a general average act, and I think that the owners of the cargo are bound to contribute their proportion in order to indemnify the owners of the ship. This last point was not made before the Queen's Bench Division, and was not brought clearly before our minds until the reply; but that is no reason for refusing to give effect to the objection when it is at last urged.

For these reasons I think that the judgment of the Court below must be reversed.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Flux, Son, & Co.*
Solicitors for defendants: *Waltons, Bubb, & Walton.*

J. E. H.

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Feb. 5.

[IN THE COURT OF APPEAL.]

PIERSON *v.* THE KNUTSFORD ESTATES COMPANY AND ANOTHER.

Solicitor—Lien—Charging Order—Money paid into Court of Bankruptcy by Plaintiff—Application by Plaintiff's Solicitor—23 & 24 *Vict. c.* 127, *s.* 28.

An action having been brought to recover a sum of £727, C., one of the defendants, counter-claimed against the plaintiff for the sum of £700. C. presented also a petition in bankruptcy against the plaintiff, who was ordered to bring into court a sum of 300*l.* The action and the proceedings in bankruptcy ultimately were referred to an arbitrator, who, by his award, found that the plaintiff was entitled to judgment in the action for £157, that no debt was due from the plaintiff to C., and that the sum of £300 must be paid to the plaintiff out of the Court of Bankruptcy. The plaintiff's solicitors having applied to the Queen's Bench Division for a charging order on the sum of 300*l.* for their costs in the action:—

Held, that they were not entitled to an order.

THIS action was commenced originally against the Knutsford Estates Co. alone, and Carlton was afterwards added as a defendant; it was brought to recover a sum of 727*l.* Carlton delivered a counter-claim, and alleged that 700*l.* was due from Pierson (the plaintiff) to him. About the time of delivering the counter-claim Carlton

presented a petition in bankruptcy against Pierson for the amount of 700*l.*, and the registrar of the Court of Bankruptcy ordered the sum of 300*l.* to be brought into court by Pierson, in order to abide the result of the hearing of the petition. This sum was accordingly brought into court. The action, together with all matters in difference between the parties, was ultimately referred to an arbitrator, and the order of reference directed that the arbitrator should have power to deal with the petition for adjudication presented by the defendant Carlton against the plaintiff Pierson, and to make an order as to the sum of 300*l.* paid into court by Pierson. After the making of the order of reference, but before the publication of the award as hereinafter mentioned, by an indenture of charge made between Pierson of the first part, Carlton of the second part, and certain bankers of the third part, after reciting that Pierson was indebted to the bankers in the sum of 300*l.* and upwards, that Carlton had guaranteed therefor up to 300*l.*, that Carlton had presented a petition in bankruptcy against Pierson, and the registrar had directed Pierson to bring into court 300*l.* to abide the result of the hearing of the petition, and the hearing of the petition had been adjourned, that Pierson had commenced the present action against the Knutsford Estates Company and Carlton to recover 700*l.* from one or other of them, that the action and all matters in difference had been referred to the arbitrator, that Pierson contended that as the result of the arbitration the 300*l.* in court (either in whole or in part) would be directed to be paid out to him, that Carlton contended that as the result of the arbitration the 300*l.* in court would be held to be due to him from Pierson in respect of the debt for which the petition had been presented, that the bankers had insisted upon the payment by Pierson and Carlton, or one of them, of the 300*l.* due from them, and had threatened proceedings in bankruptcy against both, it was witnessed that Pierson and Carlton charged their interest in the 300*l.* in favour of the bankers. In the award published by the arbitrator he found that the plaintiff was entitled to judgment in the action as against the defendant company for the sum of 157*l.* 18*s.* 11*d.*, and that the plaintiff was entitled to judgment against Carlton on the counter-claim. And as to the petition for adjudication and the sum of 300*l.* the arbitrator found that at the

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time of the presentation of the petition there was nothing due and payable by the plaintiff to Carlton, and that subject to the jurisdiction of the Court in the matter the petition should be dismissed with costs, and that the sum of 300*l.* should be paid to the plaintiff. Thereupon a summons was issued by Price, Woodcock, & Widdows, the plaintiff's solicitors, to shew cause why the sum of 300*l.* paid into court should not be charged with the payment of their costs under 23 & 24 Vict. c. 127, s. 28. At the hearing before Butt, J., he refused to make an order upon this summons; but he made an order that F. A. Woodcock, the solicitor for the plaintiff in the action, should have a charge upon the sum of 157*l.* 18*s.* 11*d.* recovered in the action for his costs, charges, and expenses in reference to the action. Price, Woodcock, & Widdows appealed to the Queen's Bench Division, and after argument judgment was reserved.

1883. Dec. 10. The judgment of the Court (Lord Coleridge, C.J., and Grove, J.) was read by

GROVE, J. This was an application for a charging order in favour of solicitors under 23 & 24 Vict. c. 127, s. 28.

The applicants were solicitors to the plaintiff, who brought an action against the defendants and their manager Carlton (who counter-claimed) in the High Court, which case with all matters in dispute was referred, and ultimately there was an award in the plaintiff's favour for 157*l.* Carlton took proceedings in bankruptcy against the plaintiff in respect of the same debt as that in respect of which he counter-claimed, and a sum of 300*l.* was paid into the Court of Bankruptcy to abide the result. This sum was mortgaged to bankers, the solicitors having the mortgage deed submitted to them, which shewed that the mortgage was entered into for the purpose of preventing the plaintiff being thrown into bankruptcy.

The words of the statute 23 & 24 Vict. c. 127, s. 28, so far as they apply to this case, are: "It shall be lawful for the Court or a judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare the attorney or solicitor entitled to a charge upon the property recovered or

preserved . . . And it shall be lawful for such Court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property, as to such Court or judge shall appear just and proper."

The principal questions in this case are: 1st, whether the money paid into the Court of Bankruptcy, as above stated, is a proper subject of a charge within the true meaning of the Act; 2ndly, whether this Court has the power under the statute to make the order in this case; and, 3rdly, whether the Court having, as we think it has, a discretion in the matter, should exercise it in favour of the applicants on the facts before it. Upon the first point the case of *Hunt* v. *Austin* (1) was cited for the applicants, as shewing that money paid into court was a proper subject for such a charge, but in that case the question, whether money paid into court was the proper subject for a charge within the statute, was not in question or discussed—the application was for a summons to shew cause why the sum of money paid into court should not be paid out to the solicitor in part satisfaction of his taxed costs. The charging order had been apparently obtained ex parte, and the application was for substituted service of the above mentioned summons. In that case, Brett, L.J., said: "Upon these facts it must be taken that the sum of 118*l.* 7*s.* 1*d.* directed to be paid to the defendant out of court, was obtained by the efforts of the solicitor, who makes the present application." So that the learned Lord Justice assumes, on what was then before him, that there must be substituted service. We are of opinion that the Court is not bound ex debito justitiæ to grant a charging order in favour of a solicitor out of a fund paid into court to abide the result of an action, or, in other words, to create a new lien in favour of solicitors. Suppose the money to have been paid into court by a plaintiff, and he recovers mere nominal damages; the Court not knowing anything of the merits or conduct of the case, it cannot, we think, be reasonably contended that the plaintiff being entitled to take the money out of court, the solicitor should have a charging order as a matter of course. The money is paid in as security for the defendant, and not as security for the plaintiff's solicitor.

(1) 9 Q. B. D. 598.

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Grove, J.

It is not in such a case recovered or preserved by the solicitor's exertions, except in a collateral way. It is unnecessary for us to decide whether or not in any case a solicitor may be entitled to a charge on money paid into court by his client. In the present case the solicitor has already obtained a charge on the sum recovered, viz., 157*l.*, and we see no reason why he should have a further charge on the 300*l.* paid into court.

The Act appears to us to vest a discretion in the Court. The words are, "It shall be lawful" to make such order, and further, for the Court to make such order for taxation, &c., "as to such Court or judge shall appear just and proper." It must also be made "by the Court or a judge before whom such suit, matter, or proceeding has been heard or shall be depending;" the object of which provision seems to us to be, that the Court or judge having cognisance of the matter should be able from its knowledge of the facts and merits of the case to properly decide, whether the order is a proper one to be made. Here the Court has no such knowledge, the cause and all matters in dispute were decided by a referee, and the money was paid into the Court of Bankruptcy, and by order of that Court. We are, therefore, of opinion that we have no power in this case within the true meaning of the statute to make the order asked for, and further, that if we have such power it is discretionary, and upon the facts before us we decline to exercise our discretion in favour of the applicants.

We have not decided this case upon the question of the fund being mortgaged with the knowledge of the solicitors. In *Faithfull* v. *Ewen* (1) the Court of Appeal, overruling Sir G. Jessel, M.R., held that the solicitor's charge took priority over the mortgage; that was a case where the plaintiffs recovered their shares and interests in an estate, and the judgment did not apply to the question of money paid into court.

Motion dismissed.

A. M.

The solicitors appealed.

1884. Jan. 28; Feb. 5. *Horne Payne*, for the appellants. The appellants are entitled under 23 & 24 Vict. c. 127, s. 28, to a

(1) 7 Ch. D. 495.

charging order on the 300*l.* paid into the Court of Bankruptcy. The money was property "preserved" through the instrumentality of the appellants within the meaning of that 28th section. *Catlow* v. *Catlow* (1) shews that this money may be "property recovered or preserved" within the meaning of the enactment, though it has been brought into a different court from that, in which the solicitor commenced the action.

[BOWEN, L.J., referred to *Pinkerton* v. *Easton.* (2)]

In that case no beneficial or meritorious service had been rendered by the solicitor. By succeeding in the action in the present case, the plaintiff got back the 300*l.* which had been paid into the Bankruptcy Court.

[BRETT, M.R. Is there any case in which the subject-matter of the charge was not the matter in dispute in the action?]

There is no decision directly in point, but *Hunt* v. *Austin* (3) and *Emden* v. *Carte* (4) are cases in which a solicitor was allowed to charge under the Act money paid into court for the benefit of his client, even though in one of those cases the person entitled ultimately to such money was not the client. The solicitor is not the less entitled to his charge under the Act, because the property was preserved for those who did not employ him. The charge has been said to be in the nature of salvage: *Bulley* v. *Bulley* (5); *Greer* v. *Young.* (6) It is next said that the Court has a discretion given to it by the Act, and that this was not a case to exercise the discretion in favour of the appellants. The discretion ought to be as much exercised in their favour as it was exercised in favour of the solicitor in *Faithfull* v. *Ewen* (7), which is substantially identical with the present case. Finally, the reference has not deprived the Court of its jurisdiction to make the charging order under s. 28: *Birchall* v. *Pugin.* (8)

Shiress Will, Q.C. (*Lewis Coward*, with him), for the defendant, Carlton. The 300*l.* was not in dispute in the action, and it was not money over which this Court had any jurisdiction. It was not property either "recovered or preserved" in the action, and

(1) 2 C. P. D. 362.
(2) Law Rep. 16 Eq. 490.
(3) 9 Q. B. D. 598.
(4) 19 Ch. D. 311.
(5) 8 Ch. D. 479, at p. 484.
(6) 24 Ch. D. 545, at p. 552.
(7) 7 Ch. D. 495.
(8) Law Rep. 10 C. P. 397

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therefore was not a fund on which a charging order could be made by the 28th section. *Catlow* v. *Catlow* (1) was very different from the present case, for the money there was the proceeds of the same goods for which the action had been brought. To be "recovered or preserved" within the meaning of the enactment, the property must be the subject-matter of the litigation, and directly, and not merely consequentially, affected by the decision in the action. In *Emden* v. *Carte* (2) the money, upon which the original plaintiff's solicitor was held to be entitled to have a charge, was recovered from the defendant. It was not a case where a solicitor claims a charge upon money, which at the time of instituting legal proceedings belonged to his own client.

[He was then stopped.]

Horne Payne was called upon to reply. The applicants are entitled to an order in priority to the bankers' mortgage: *Birchall* v. *Pugin*. (3) If any kind of benefit results to a party to a suit from his solicitor's conduct of it, the solicitor is entitled to a charge upon the benefit accruing to the client: *The Philippine*. (4)

BRETT, M.R. The plaintiff issued the writ of summons originally against the Knutsford Estates Co., and Carlton was afterwards joined as a defendant. The debt due to the plaintiff was alleged to be 727*l*. Carlton, by a counter-claim, alleged that a sum of 600*l*. or 700*l*. was due to him from the plaintiff, and presented a petition in bankruptcy against the plaintiff. In the course of the proceedings upon this petition a sum of 300*l*. was ordered to be brought into court by the plaintiff, not to be paid out to Carlton, but to abide the further orders of the Bankruptcy Court; and this sum having been brought in accordingly, the hearing of the bankruptcy petition was adjourned. The action was referred, and the order of reference contained a clause that the arbitrator was to determine what should be done with the 300*l*. He ordered that it should be paid out to the plaintiff. The solicitors of the plaintiff now claim that they are entitled to a charge upon this sum of 300*l*., as being "property recovered or preserved" by them within the meaning of 23 & 24 Vict. c. 127, s. 28. It has been

(1) 2 C. P. D. 362.
(2) 19 Ch. D. 311.
(3) Law Rep. 10 C. P. 397.
(4) Law Rep. 1 A. & E. 309.

contended that the 300*l.* was "preserved" by their exertions. On the other hand, it has been argued that only property which is the direct subject-matter of litigation can be charged with the payment of a solicitor's costs. I do not decide this point; but I have to remark that this 300*l.* was not brought in to abide the event of the action, but to abide the further orders of the Court of Bankruptcy. Suppose that another petition had been presented, and the creditor's debt had been proved; if the plaintiff Pierson had been adjudged bankrupt upon that other petition, the sum of 300*l.* would not have been paid out to him. I do not enunciate an exhaustive definition. I will deal only with this 300*l.* Was it preserved under this litigation? The 300*l.* was not preserved within the meaning of the statute by the litigation which ended in the award, because it was not sufficiently directly affected by that litigation. It was not sufficiently directly affected by that litigation, because after the termination of that litigation the right to the 300*l.* depended upon the judicial discretion of the judge of the Bankruptcy Court, which might be affected by circumstances wholly extraneous to the result of that litigation.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors for Price, Woodcock, & Widdows: *Gregory, Rowcliffes, Rawle, & Johnstone.*

Solicitors for Knutsford Estates Co.: *Rowley, Page, & Rowley.*

Solicitor for Carlton: *A. Kerly.*

J. E. H.

1884
July 5.

THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY *v.* THE DENABY MAIN COLLIERY COMPANY.

Railway Company—Carrier—Unequal Tolls—Group Rates—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 90—*Undue Preference—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 2, 6—*Action for Breach of Railway and Canal Traffic Act, whether maintainable.*

Sect. 90 of the Railways Clauses Consolidation Act, 1845, provides that the tolls charged by railway companies for the carriage of goods shall be charged equally to all persons and after the same rates in respect of all goods of the same description "passing only over the same portion of the line of railway," and that no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular person using the railway. A railway company carried coals to a point upon their railway from a group of collieries placed along the line at varying distances from that point, and charged tolls at one rate per ton in respect of such carriage to all the members of the group. In an action for overcharges by the owner of the colliery lying nearest to the point of carriage:—

Held, that the company had committed a breach of the provisions of s. 90, which section applied notwithstanding that the termini of the transit over the company's line from the group to the point of carriage differed with respect to each colliery, and therefore that the company were liable in the action.

An action will not lie in respect of a breach of the provisions of s. 2 of the Railway and Canal Traffic Act, 1854.

SPECIAL CASE.

Action for the balance of an account for carriage of the defendants' coal by the plaintiffs upon their railway.

Counter-claim for overcharges and excessive and unequal rates charged by the plaintiffs, during a period of six years before the action was brought, against the defendants in respect of the carriage of the defendants' coal over the plaintiffs' railway, and over a canal belonging to the plaintiffs, whereby the plaintiffs were alleged to have unduly favoured other colliery owners and subjected the defendants to an undue and unreasonable disadvantage, contrary to the provisions for equality contained in the Railways Clauses Consolidation Act, 1845, s. 90, and the Railway and Canal Traffic Act, 1854, s. 2. The defendants claimed 30,000*l.* in respect of their counter-claim, and alternatively 30,000*l.* damages.

The action was referred to an arbitrator, with power to state a special case.

For the purposes of this report it is only necessary to state the following facts, which were set out in the case.

The defendants were colliery owners, carrying on business near Doncaster. Their colliery is situated on the line of the plaintiffs' railway and connected with it by sidings, and has no direct communication with any other line of railway.

During the period covered by the action the plaintiffs charged one uniform set of rates per ton for the carriage of coal from about forty-eight different collieries (specified in the case and termed "the group"), to a number of specified places lying eastward of those collieries, and served by the plaintiffs' railway. The rates so charged were termed the "group rates."

The defendants' colliery is the easternmost in the group, and the distance along the plaintiffs' line of railway between the defendants' colliery and the number of the group furthest from the defendants' colliery is fifteen miles.

The "group rates" comprised the rates from each of the collieries forming the group to a great number of towns and places in various parts of England. All coals going from any of the collieries comprised in the group to any of the last-mentioned towns and places must pass the defendants' colliery and go away thence in an easterly direction. There was no "grouping" for traffic westward. Coal going to the westward from any of the collieries comprised in the group was charged differing rates according to the distance from the colliery from which it was dispatched to the place of destination. The defendants' colliery, being the furthest to the eastward of the collieries in the South Yorkshire coal field, paid the highest rates for coal going west, whilst they paid the same rates as the rest of the collieries in the group upon coal going east.

On the 26th of July, 1880, the Railway Commissioners, upon the application of the defendants, gave judgment prohibiting the plaintiffs from charging equal rates of carriage between the various collieries comprising the group and the places lying to the eastward to which the group rates had applied. For the

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purposes of the case it was not disputed that the decision of the Commissioners was right.

The plaintiffs ceased to charge the group rates from the 26th of July, 1880, and thenceforward carried coals from the various members of the group at differential rates. The rates thus established were, in respect of coal carried from the defendants' colliery, lower in every instance than the group rates.

For the purposes of the case it was admitted that the circumstances under which payments had been made did not preclude the defendants from opening the accounts.

The defendants contended that the group rates were a violation of s. 90 of the Railways Clauses Consolidation Act, 1845, and of s. 2 of the Railway and Canal Traffic Act, 1854, and that they were entitled, under either of those enactments, to recover the difference between the amount actually paid by them for carriage of coal and the amount which would have been payable if proper differential charges had been made for carriage of coal from the different members of the group, and not only such differences but damages for breaches of the statutory duty.

The plaintiffs contested each of the above claims.

The questions for the opinion of the Court were (inter alia):—

Did the group rates constitute a violation of the Railways Clauses Consolidation Act, 1845, s. 90? (1)

If so, are the damages of the defendants for the breach of that enactment limited to the amount of overcharges (and what is the measure of such overcharges), or can general damages also be recovered?

(1) By the Railways Clauses Consolidation Act, 1845, s. 90, railway companies are empowered to vary the tolls authorized to be taken by special Acts either upon the whole or upon any particular portions of the railway as they shall think fit: "Provided that all such tolls be at all times charged equally to all persons and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the railway."

Does an action lie for breach of the Railway and Canal Traffic Act, 1854, s. 2? (1)

If so, are the damages of the defendants for the breach of that enactment limited to the amount of overcharges (and what is the measure of such overcharges), or can general damages also be recovered?

June 17, 24. *Forbes*, Q.C. (*Webster*, Q.C., and *Lofthouse*, with him), for the defendants.

C. A. Russell (*Sir F. Herschell*, S.G., and *Littler*, Q.C., with him), for the plaintiffs.

The following cases were cited:—*In re Ransome and Eastern Counties Ry. Co.* (2); *Evershed* v. *London and North Western Ry. Co.* (3); *Great Western Ry. Co.* v. *Sutton.* (4)

Cur. adv. vult.

July 5. The judgment of the Court (Mathew and Day, JJ.) was delivered by

MATHEW, J., who, after disposing of the questions raised by the first part of the special case (which questions depended mainly upon the effect of the findings of fact by the arbitrator with

(1) By the Railway and Canal Traffic Act, 1854, s. 2: "Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, or other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

By s. 6: "No proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law."

(2) 4 C. B. (N.S.) 135; 27 L. J. (C.P.) 166.

(3) 2 Q. B. D. 254; 3 Q. B. D. 134; 3 App. Cas. 1029.

(4) Law Rep. 4 H. L. 226.

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respect to a number of other instances of undue preference), proceeded :—

The second part of the case raises the question whether the group rates constituted a breach of s. 90 of the Railways Clauses Consolidation Act, 1845. Our answer to that question is that we think the group rates were a violation of s. 90, and that the overcharge may be recovered in accordance with *Evershed's Case*. (1) We cannot adopt the narrow construction of s. 90 contended for by the plaintiffs' counsel, namely, that it only applies where the termini of the transit correspond. In the absence of special circumstances to justify the same charge for carrying a greater distance for one customer than for another, there would appear to be that kind of inequality which s. 90 is intended to prevent. In such cases part of the services to the particular customer would practically be rendered gratuitously and to the disadvantage of others. We think, therefore, that s. 90 applies.

We are further asked whether, if s. 90 applies, the defendants' damages for the breach of that section are limited to the amount of the overcharges, or whether general damages can also be recovered. To that we answer that we see in the statement of facts before us no ground upon which an action for damages would be maintainable.

Another question is, does an action lie for breach of the Railway and Canal Traffic Act, 1854, s. 2? We are of opinion that an action does not lie for anything done in contravention of that Act. It seems conclusive from s. 6 that no such action can be maintained. The terms of that section are:—"No proceeding shall be taken for any violation or contravention of the above enactments except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway company under the existing law." The present action is brought to recover overcharges—overcharges having regard to the provisions of s. 2—and the ingenious suggestion was made in argument that an action in respect of such overcharges was not an action for

(1) 2 Q. B. D. 254; 3 Q. B. D. 134; 3 App. Cas. 1029.

anything done in contravention of the statute, but an action for the detention of money. But the money would be properly charged and properly detained if it were not for the prohibition contained in the Act. It is, therefore, perfectly clear that in substance the action is brought for something done in contravention of the Act. We were much pressed in argument with *Evershed's Case* (1), which was treated as a decision that an action would lie for breach of the provisions of s. 2 of the Railway and Canal Traffic Act. With reference to that case it is only necessary to say that, whatever the language in some of the judgments may be, the point was not presented to the Court, and no opinion was expressed upon it. The judgment was that the provisions of s. 90 of the Railways Clauses Consolidation Act, 1845, had been violated, and that an action would lie in respect of that violation. We are fortified in our view that an action will not lie for a breach of the Railway and Canal Traffic Act by the judgment of Pollock, B., which we have had an opportunity of examining, in the unreported case of *Denaby Main Colliery Co.* v. *Manchester, Sheffield, & Lincolnshire Ry. Co.*

Judgment accordingly.

Solicitors for plaintiffs: *Cunliffe, Beaumont, & Davenport, for R. Lingard-Monk, Manchester.*

Solicitors for defendants: *Indermaur & Co., for F. W. Fisher, Doncaster.*

(1) 2 Q. B. D. 254; 3 Q. B. D. 134; 3 App. Cas. 1029.

W. A.

1884
June 30.

CROWTHER *v.* BOULT.

Justices—Case stated under 20 & 21 *Vict. c.* 43, *and remitted for amendment, but not returned—Jurisdiction over Costs.*

A case having been stated by justices under 20 & 21 Vict. c. 43, and remitted to them for an amended statement, but not returned within the proper time, and therefore abandoned,—

Held, that the Court still had jurisdiction to order the appellant to pay the respondent's costs.

A CASE was stated by justices under 20 & 21 Vict. c. 43, and remitted by the Court for further information, but was not returned within the proper time.

Morton Smith, for the respondent, moved to dismiss the appeal with costs.

Pitt-Lewis, for the appellant, submitted that, inasmuch as the Court had no jurisdiction to hear the appeal, they could not entertain an application for costs; citing *Gloucester Local Board* v. *Chandler*. (1)

[MATHEWS, J. That case is no authority to shew that the appellant must not pay costs. We must have jurisdiction over the costs.]

Morton Smith, referred to *Great Northern and London and North Western Joint Committee* v. *Inett* (2), where the Court, upon the authority of *Diss Urban Authority* v. *Aldrich* (3), ordered the appellants to pay the respondent's costs under similar circumstances.

MATHEW, J. The appeal having been abandoned, the respondent is clearly entitled to the costs of the appeal and of this application.

DAY, J., concurred.

Order accordingly.

Solicitors for appellant: *Aldridge, Thorn, & Morris, for Harmer & Ruddock, Great Yarmouth.*

Solicitor for respondent: *A. R. Oldman.*

(1) 32 L. J. (M.C.) 66. (2) 2 Q. B. D. 284. (3) 2 Q. B. D. 179.

J. S.

THE QUEEN *v.* LLEWELLYN.

1884
June 30.

Nuisance, Power of Justices to order specific Works for Abatement of—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94–96.

A privy openly discharged nightsoil and offensive matter on the bank of a river, the sanitary authority served the owner of the premises with a notice to abate the nuisance, and for that purpose "to remove the present pipes and pan, level the floor under the seat of the privy, and provide a galvanized double-handle pail under the seat, the cover of which said seat to be moveable, so that the premises should no longer be a nuisance or injurious to health." And the justices at sessions made an order in the terms of the notice:—

Held, that they had jurisdiction to make the order.

Ex parte Saunders (11 Q. B. D. 191) followed; and *Ex parte Whitchurch* (6 Q. B. D. 545) distinguished or dissented from.

THE sanitary authority of Cymmer, Glamorganshire, served a notice under s. 94 of the Public Health Act, 1875, upon the owner of premises at Cymmer to abate a nuisance which consisted of "a privy openly discharging nightsoil and offensive matter on the bank of the river" at that place.

The magistrates on hearing the parties, on the 9th of May, 1884, ordered the owner "to remove a nuisance in or upon certain premises situate, &c., and for that purpose to remove the present pipes and pan, level the floor under the seat of the privy, and provide a galvanized double-handle pail under the seat, the cover of which said seat to be moveable, so that the premises should no longer be a nuisance or injurious to health."

A rule nisi was, upon the authority of *Ex parte Whitchurch* (1), obtained for a writ of certiorari to bring up the order to be quashed, on the ground that the justices had no authority to order the substitution of a particular kind of pan or pail for the original arrangements of the privy. The affidavit in support of the application stated, amongst other things, that the closet in use for the purposes of the said dwelling-house, and which had been in use ever since the erection of the house in or about the

(1) 6 Q. B. D. 545.

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year 1875, was, a pan with a pipe leading therefrom into a river, which pan and pipe were regularly flushed with water; and that there was no complaint against the closet of being flushed into the river.

Forbes, Q.C. (*Hamilton* with him), shewed cause. Sect. 96 of the Public Health Act, 1875 (1), clearly warrants the order which the justices have made: they alone are the judges of what works are necessary for the abatement of the nuisance complained of. As to this the judgment of Cave, J., in *Ex parte Saunders* (2) is expressly in point. "Who," he says, "upon the true construction of these provisions (3) is to decide what works are necessary for the purpose of abating the nuisance? It seems to me obvious that the justices are intended to decide. Here the justices, being satisfied that the nuisance was likely to recur, and that these works were necessary for the prevention of such recurrence, have ordered them to be done. I should have thought that upon the terms of the section it was as clear as could be that they had jurisdiction to make the order—Whether the case of *Ex parte*

(1) Sect. 94 of the Act enacts that, "on the receipt of any information respecting the existence of a nuisance, the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose."

Sect. 95 enacts that, "if the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof within the time specified, or if the nuisance, although abated since the service of the notice, is in the opinion of the local authority likely to recur on the same premises, the local authority shall cause a complaint relating to such nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction."

Sect. 96 enacts that, "if the court is satisfied that the alleged nuisance exists, or that, although abated, it is likely to recur on the same premises, the court shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose."

And see Sched. IV., Form C.

(2) 11 Q. B. D. 191.

(3) Sects. 94, 95, 96.

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Whitchurch (1) is right or wrong, it does not appear to me to be any authority to shew that this order is bad." (2)

Brynmôr Jones, in support of the rule. The case of *Ex parte Whitchurch* (1) is a distinct authority to shew that neither the sanitary authority nor the justices have power to do more than require and order *the abatement of the nuisance complained of*: they cannot prescribe the particular mode of abating it. In that case the notice and order were in precisely the same terms as in this case. The judgment of Pollock, B., seems to be conclusive. "No doubt," he says, "there are cases where works are necessary for the abatement of a nuisance; for instance, to connect drains with the main sewer, or to get a sufficient supply of water; but I can see no words in the 94th section to justify the contention that the owner of the premises can under it be required to put up a particular kind of closet. The duty of the justices is stated in s. 96, and there again the substantial matter dealt with is that the nuisance is to be abated, and the justices are to see that the notice to that effect is carried out." The order here is almost identical in its terms with the order in that case. The case of *Ex parte Saunders* (3) was decided without at all impeaching the decision in *Ex parte Whitchurch* (1).

MATHEW, J. I am of opinion that this rule should be discharged. The words of the Public Health Act, 1875, require that the notice and order shall specify the works necessary for the abatement of the nuisance complained of. It would be very unreasonable if it were not so; otherwise the party complained against might be called upon to do the work over again. It may be that in *Ex parte Whitchurch* (1) the justices went too far in ordering the owner of the premises "to fill up the ash-pit, to abandon the privy, and to construct a proper and sufficient pail-closet in lieu thereof." Here, there being an existing privy which was found to be a nuisance and injurious to health, the sanitary authority in order to abate it have directed certain works

(1) 6 Q. B. D. 545.

(2) The affidavit in support of the order of the justices stated that the only way of abating the nuisance was by carrying out the works specified in the notice and order.

(3) 11 Q. B. D. 191.

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to be done,—not the construction of a new privy, but the amendment of the existing one, subject to an appeal to the sessions,—and the sessions have adopted the mode suggested by the sanitary authority for the abatement of the nuisance. I cannot doubt that they had jurisdiction to make the order they have made. I adopt the decision in *Ex parte Saunders*. (1) If that case differs from *Ex parte Whitchurch* (2), I differ too.

DAY, J., concurred.

Rule discharged, with costs.

Solicitor for appellant: *H. Thomas, for T. Williams, Neath.*
Solicitors for sanitary authority: *Bell, Brodrick, & Gray.*

J. S.

June 30.

GABRIEL *v.* BLANKENSTEIN.

Bankrupt—Disclaimer of leasehold Interest—Use and Occupation—Bankruptcy Act, 1869, *s.* 23—*Rule* 28 *of the Bankruptcy Rules*, 1871.

W., who occupied premises as a yearly tenant, was adjudicated bankrupt on the 7th of September, 1883. The defendant, as trustee, entered into possession of the premises and held them until the 29th of January, 1884 (when he tendered the keys to the plaintiff, the landlord), for the purpose of winding up the bankrupt's business and realizing his assets for the benefit of the estate,—paying rent down to the 25th of December, 1883.

On the 26th of February, 1884, the trustee with the leave of the Court, and after notice to the landlord, disclaimed all interest in the term:—

Held, that the disclaimer relating back by force of s. 23 of the Bankruptcy Act, 1869, to the date of the adjudication, the trustee was not liable to an action in respect of his subsequent occupation of the premises (either as assignee or as a trespasser); the landlord's only remedy being by application to the Court of Bankruptcy under rule 28 of the Bankruptcy Rules, 1871.

CASE stated on appeal from the Southwark County Court.

1. This action was brought to recover 9*l.* 11*s.* 9*d.* for the use and occupation of premises 138 Belvedere Road, and 22 Howley Place, Belvedere Road, Lambeth, from the 25th of December, 1883, to the 29th of January, 1884. At the trial the following facts were proved or admitted.

2. Prior to and on the 7th of September, 1883, Frederick

(1) 11 Q. B. D. 191. (2) 6 Q. B. D. 545.

Winterhoff occupied the premises as yearly tenant to the plaintiff at a rental of 100*l.* a year, payable quarterly, and carried on thereat the business of a lithographic stone-quarry proprietor.

3. On the 7th of September, 1883, Winterhoff was adjudicated bankrupt; and on the 10th of October, 1883, the defendant was appointed trustee of his property.

4. The defendant entered into possession of the premises and held and retained the same until the 29th of January, 1884, and used and occupied them for the purpose of disposing of the bankrupt's stock-in-trade and other property, and for winding up the bankrupt's business, and realizing his assets for the benefit of the estate.

5. The defendant paid to the plaintiff who accepted from him 125*l.* for rent of the premises until the 29th of September, 1883, and a further sum of 25*l.*, being a quarter's rent of the premises to the 25th of December, 1883. No further rent of the premises has been paid. On or about the 29th of January, 1884, the defendant tendered the keys of the premises to the plaintiff, who refused to accept them.

6. On the 26th of February, 1884, the defendant, as trustee as aforesaid, pursuant to leave in that behalf granted by the London Bankruptcy Court upon motion, notice of which had been duly served upon the plaintiff, by writing under his hand, disclaimed all the bankrupt's and his property and interest as trustee of the bankrupt in the said premises. The plaintiff did not give the defendant notice to disclaim.

7. On the 5th of May, 1884, the case was tried before the judge of the county court of Southwark, without a jury, when a verdict and judgment was given for the defendant, with costs; the judge holding that the trustee of a bankrupt was not in law liable for the use and occupation of premises the interest in which he had disclaimed. The judge gave the plaintiff leave to appeal.

The question for the opinion of the Court was, whether on the facts above stated the defendant was in law liable for his use and occupation of the premises from the 25th of December, 1883, to the 29th of January, 1884.

Herbert Reed, for the plaintiff. The trustee having entered

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and paid rent, he must either be liable as assignee upon an implied contract, or as a trespasser, for use and occupation, as in the case of one entering under a void lease: *Lowrey* v. *Barker* (1); *Titterton* v. *Cooper*. (2) The judgment of Thesiger, L.J., in *Lowrey* v. *Barker* (1) is express.

Sydney Woolf, contrà. The trustee was in, if at all, as assignee under the term, and not as a trespasser; and might have been liable for rent down to the time of the disclaimer, which by s. 23 of the Act of 1869 has relation back to the date of the adjudication: *Ex parte Sadler, In re Hawes.* (3) The proper course for the plaintiff to adopt in this case was that indicated by rule 28 of the Bankruptcy Rules of 1871 (4); and in a proper case the trustee would be put upon terms. In *Ex parte Isherwood, In re Knight* (5) it was contended that, where there is an application for leave to disclaim, the trustee ought to be put under the terms of paying the whole of the rent reserved by the lease which he disclaims, up to the date of the disclaimer. But Cotton, L.J., said (6): "That would be entirely contrary to the provisions of the Act. The Act, by throwing back the effect of the disclaimer to the date of the adjudication, relieves the trustee as from the date of the adjudication from the consequences of the lease having vested in him. To say that in every case when a trustee applies for leave to disclaim a lease, he should be put on the terms of paying the rent as if the disclaimer took effect only from the date of its execution, would be to repeal the Act. In certain cases the Court has, and in my opinion rightly, put the trustee so coming for leave to disclaim under terms. When the lease vests in him as trustee, he becomes personally liable for the rent, with a right to go against the bankrupt's estate for

(1) 5 Ex. D. 170.

(2) 9 Q. B. D. 473.

(3) 19 Ch. D. 122.

(4) Rule 28 provides that, "where any property of a bankrupt acquired by a trustee under the Bankruptcy Act of 1869 shall consist of a leasehold interest, the trustee shall not execute a disclaimer of the same without the leave of the Court being first obtained for that purpose; and, upon any application to the Court for such leave, notice of the desire of the trustee to disclaim such interest shall be given to such person or persons as the Court shall direct; and such order shall be made thereon as the Court shall think fit."

(5) 22 Ch. D. 384.

(6) At p. 394.

indemnity. When he has disclaimed the lease, then it has been held that the landlord's rights under the lease as against the trustee of the estate of the bankrupt are gone, and that he cannot sue the trustee for the use and occupation of the property. It has been held that the trustee cannot be sued as a trespasser, and under special circumstances it is in my opinion right that he should be put under the terms of making some payment to the landlord when he comes for leave to deprive the landlord, as from the date of the adjudication, of the legal rights given to him by the lease which is to be disclaimed or put an end to as from that date, the landlord having, except under rule 28, and by means of the right to prove given to him by s. 23, no remedy in respect of the trustee's use and occupation of the property, nor any right to treat the trustee as a trespasser." That rule was adopted in *Ex parte Arnal, In re Witton* (1), in preference to that suggested by Sir G. Jessel, M.R., in *Ex parte Izard, In re Bushell.* (2) Bramwell, L.J., in *Lowrey* v. *Barker* (3) says: "The question is whether the trustee is liable on a contract to pay for use and occupation. It is an action of contract. There is no express contract, and the question therefore must be whether there is one implied. The only ground for implying such a contract is, that otherwise the plaintiff is a trespasser by virtue of the retrospective operation of s. 23. I think that a trespass cannot be turned into a contract in this way." The point is really covered by authority.

Herbert Reed, in reply, referred to *Reed* v. *Harvey* (4), and submitted that the common-law rights of the landlord remained notwithstanding the additional remedy given to him by s. 23 of the Bankruptcy Act, 1869, and rule 28 of the Bankruptcy Rules, 1871.

MATHEW, J. I am of opinion that the judgment of the county court is right, and must be upheld. The point is, as it seems to me, covered by authority; and, if it were not so, I should have come to the same conclusion. The trustee clearly cannot be treated as a trespasser: his position, when part of the property

(1) 24 Ch. D. 26.
(2) 23 Ch. D. 115, 117.
(3) 5 Ex. D. at p. 174.
(4) 5 Q. B. D. 184.

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of the bankrupt vested in him consists of a leasehold interest, is that which is pointed out in s. 23 of the Bankruptcy Act, 1869, and rule 28 of the Rules of 1871: he may apply to the Court for leave to disclaim, and the Court may make such order thereon as it shall think fit. The cases referred to shew what is the practice of the Court of Bankruptcy upon such applications. The trustee is entitled to enter and see if there is anything to realize for the benefit of the bankrupt's estate, and is not to be deemed a trespasser; nor can he be made liable as upon an implied contract for use and occupation. The landlord's proper remedy is that pointed out by the rule: he should have gone to the bankruptcy court, and not to the county court.

DAY, J., concurred.

Judgment for the defendant.

Solicitors for plaintiff: *Layton, Son, & Lendon.*
Solicitors for defendant: *Trinders & Romer.*

J. S.

Aug. 12.

IN THE MATTER OF AN ARBITRATION BETWEEN MAY AND ANOTHER AND HARCOURT.

Arbitration—Time for making Award—Enlargement by Court—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 15.

By a submission in writing the time within which the award was to be made was fixed at one month. The submission contained no power to enlarge the time. The award was in fact made after the expiration of the month:—

Held, that the Court had power subsequently to the making of the award to enlarge the time under s. 15 of the Common Law Procedure Act, 1854.

CROSS-MOTIONS to set aside an award and to enlarge the time for making it, under the following circumstances:—

Messrs. May, surveyors, were employed by C. Harcourt to do certain work as to the value of which a dispute arose. Thereupon it was referred to two surveyors, one appointed by either party, to measure up and determine the value of the work. The agreement to refer was made on the 9th of February, 1884, and the award was to be made within one month from that date. There was no clause in the agreement as to the extension of the time for making the award, either by the arbitrators or otherwise. The

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arbitrators did not make their award till the 8th of May, 1884, and an action on the award was commenced by Messrs. May against Harcourt on the 19th of July, 1884. The defendant in that action subsequently made the agreement to refer a rule of court, and now moved to set the award aside on the ground that it was made out of time. The plaintiffs moved for an order enlarging the time for making the award until the day that it was actually made, namely, the 8th of May, 1884.

J. V. Austin, for the plaintiffs in the action. The only objection raised to the award is that it was made out of time. In no respect has the defendant been damnified, and the Court is asked to use its discretion under s. 15 of the Common Law Procedure Act, 1854 (1), to enlarge the time, as in *Lord* v. *Lee* (2) and *Denton* v. *Strong* (3).

Pollard, for the defendant in the action. An action has been brought on the award, to which the defendant pleads no award. It is therefore too late to enlarge the time, as to do so would be to alter the actual position of the parties, and if this step can be taken now it could be taken at any time in the course of the trial of the action, which might involve serious consequences to the defendant. Sect. 15 of the Common Law Procedure Act, 1854, deals with cases where no time is fixed by the contract. In *Lord* v. *Lee* (2) the Court enlarged the statutory time for making an award, and in *Denton* v. *Strong* (3) an enlargement was in contemplation of the parties, but in no case has the Court enlarged the time where it has been definitely fixed by the parties, and there has been no stipulation as to enlargement, as

(1) 17 & 18 Vict. c. 125, s. 15: "The arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time), within three months after he shall have been appointed, and shall have entered upon the reference, or shall have been called upon to act by a notice in writing from any party; but the parties may by consent in writing enlarge the time for making the award; and it shall be lawful for the superior Court of which such submission, document, or order is or may be made a rule of Court, or for any judge thereof, for good cause to be stated on the rule or order for enlargement, from time to time to enlarge the term for making the award."

(2) Law Rep. 3 Q. B. 404.

(3) Law Rep. 9 Q. B. 117.

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there was in *Ward* v. *Secretary of State for War.* (1) Here the time is fixed by the agreement, and must be taken to be of the very essence of the contract.

LORD COLERIDGE, C.J. In this case the parties agreed to submit certain matters to arbitration, and one of the terms of the submission was that the award should be made within a month from the time of the submission. The award was not made till later, and in the absence of any enlargement of the time by the Court the objection to the award would hold good. We are asked, however, to remedy this by enlarging the time under s. 15 of the Common Law Procedure Act, 1854, which clothes the Courts with what I may describe generally as a power to enlarge the time for making awards. It is said, however, that the power of the Court to enlarge the time is limited to those cases which fall within the parenthesis in the first part of s. 15, that is to say, where the parties have not agreed to a particular time for making the award. The exact case we have to decide does not seem to have been before the Court, and we must gather the principles on which the Court acts from cases decided in pari materiâ.

The Common Law Procedure Act, 1854, fixes three months as the time within which an award must be made where the time is omitted from the submission. Now it has been decided, in *Lord* v. *Lee* (2), that in such a case, that is where by force of the Act there is a binding agreement between the parties that three months shall be the time, the Court may extend that time, though the application for an extension is not made till after the expiration of the three months, and after the award has been made. In that case the arbitrator had acted in excess of the power conferred on him, and had made the award after the time prescribed by the parties, and, as in this case, proceedings had been commenced to enforce the award. There is also the case of *Denton* v. *Strong* (3) where it was stipulated that the award should be made within a month, but the arbitrator might enlarge the time so as not to exceed three months, which he did not do. In that case also the Court acted under the authority of the statute and

(1) 32 L. J. (Q.B.) 53. (2) Law Rep. 3 Q. B. 404.
(3) Law Rep. 9 Q. B. 117.

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enlarged the time, and in giving judgment, Blackburn, J., said, with the consent of Archibald and Quain, JJ., that the Court could enlarge the time irrespectively of the contract of the parties. I entertain no doubt that that case was well decided, and that the principle of it applies to the present case. I think, therefore, that the application to extend the time must be acceded to, and that the application to set aside the award must be refused.

FIELD, J., concurred.

Solicitors for Messrs. May: *Trinders & Romer.*
C. Harcourt, in person.

A. M.

BURSILL *v.* TANNER.

June 17.

Practice—Married Woman—Judgment against—Form of—Separate Estate—Restraint on Anticipation—45 & 46 *Vict. c.* 75, *ss.* 1, 19—*Judicature Acts, Ord. XIV.*

An order giving leave to enter final judgment against a married woman in respect of her separate estate by virtue of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 19, should state that execution is to be limited to such separate estate as the defendant is not restrained from anticipating unless such restraint exists under any settlement or agreement for a settlement of her own property made or entered into by herself.

APPEAL by the defendant, a married woman, against an order of Pearson, J., at chambers, under Order XIV., giving the plaintiff leave to sign final judgment in an action for goods sold and delivered for the amount indorsed on the writ, with interest (if any), but execution thereon to be limited to the separate estate of the defendant. The marriage of the defendant and the purchase of the goods were before the passing of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

Mansel Jones, for the defendant. Although the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), was held to be retrospective as to procedure in *Gloucestershire Banking Co.* v.

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Phillips (1), this order affecting the separate estate of the defendant without any limitation is too general. It would apply to separate estate to which she became entitled after the contract sued on, or subject to restraint on anticipation, but such separate estate cannot be taken in execution, for, if it were, the intention of the settlor or testator who imposed the restraint would be defeated: *Pike* v. *Fitzgibbon.* (2)

[*Per Curiam.* But now, by the Married Women's Property Act, 1882, s. 1, sub-s. 2, a married woman is capable of rendering herself liable in respect of and "to the extent of her separate property," and "also all separate property which she may thereafter acquire:" sub-s. 4.]

Sect. 19 provides, however, that nothing in this Act shall interfere with or render inoperative any restraint on anticipation, unless created by herself. There cannot be judgment against a married woman under Order XIV., even when limited to separate estate. But if any such order can be made, it should be confined to separate estate not subject to any restraint on anticipation, as was the order of Field, J., in *Gloucestershire Banking Co.* v. *Phillips* (1), and in *Perks* v. *Mylrea.* (3)

Longstaffe, for the plaintiff. The Married Women's Property Act, 1882, is retrospective as to procedure, and it applies to the present case. The defendant has filed no affidavit, and has no defence. Judgment under Order XIV. may be signed against her, although execution should only issue against her separate estate: *Perks* v. *Mylrea.* (3) The order is within the terms of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1. The further limitation of it to property not subject to a restraint on anticipation was not suggested at chambers.

FIELD, J. If the attention of Pearson, J., had been drawn to the question now argued before us, his order would, I think, have been limited as we propose to limit it. He, indeed, imposed a condition on execution, and it seems to me desirable that the order for judgment, which cannot operate in a general way on all the property of the debtor, should shew on the face of the

(1) 12 Q. B. D. 533. (2) 17 Ch. D. 454.
(3) W. N. March 8, 1884.

order that it is by virtue of the Married Women's Property Act, and is not to have the ordinary consequence of a fi. fa., but that execution is to be limited to the separate estate of the defendant. The present order is limited to the separate estate.

But it is said that under the terms of that limitation her separate estate restrained from anticipation might be seized, and that it ought not to be so, and therefore the limitation should be accurately stated to be—not merely to separate estate, but also to separate estate which the married woman is not restrained from anticipating. Mr. Mansel Jones also said that the order was wrong because it applied to her separate estate generally. But the law as laid down in *Pike* v. *Fitzgibbon* (1) is now altered by the Act, and it is clear that when a married woman makes a contract it is binding on her so that she can be sued, and judgment may go, not only as to property which she had at the time of the contract, but as to property which she has at the time of the judgment. Therefore the order is correct so far. Ought it to be further limited? In one respect it is right, because it is in the terms of s. 1, sub-s. 2, and if that section stood alone, I am not prepared to say what construction should be put on it. But s. 19 clearly shews the intention of the legislature. It was not intended to abrogate the rule of equity in favour of married women, or rather of the testator or settlor, that a married woman is not to be deprived of what is given to her by will or settlement with a restraint on anticipation, even if she has attempted to dispose of it. Sect. 19 preserves that doctrine, it says "that nothing in this Act . . . . shall interfere with or render inoperative any restriction against anticipation . . . . attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument," therefore it could not be the intention of the legislature that the words "to the extent of her separate property," in s. 1, sub-s. 2, should have the large meaning contended for; so that limitation ought to be introduced, and our order will be that execution is to be limited to such separate estate as the defendant is not restrained from anticipating unless such restraint exists under any settlement or

(1) 17 Ch. D. 454.

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agreement for a settlement of her own property made or entered into by herself. That last proviso will meet the case of any fraudulent settlement or agreement made by the married woman herself to defeat her creditors, and will leave the doctrine of Chancery as to the settlor's or testator's will untouched.

MANISTY, J., concurred.

Order varied accordingly.

Solicitors for plaintiff: *Dod & Longstaffe.*
Solicitors for defendant: *Freshfields & Williams.*

J. R.

Aug. 11.

GOODES *v* CLUFF.

County Court—Appeal—Leave of Judge—Discretion of Judge under 30 *&* 31 *Vict. c.* 142, *s.* 13.

A county court judge having given a defendant leave to appeal, but subject to a condition that he should pay the plaintiff's costs of the appeal in any event, and should also, in case the appeal were unsuccessful, pay the costs of the trial upon the higher scale,—the Divisional Court held that it had no power to interfere with the discretion vested in him by 30 & 31 Vict. c. 142, s. 13.

THIS was an action tried in the county court of Huntingdon. It was brought to recover the value of a horse which died under the following circumstances:—The horse was grazing on a common upon which a company of volunteers under the command of the defendant, their captain, were at drill, firing blank cartridges. The noise of the firing so frightened the horse that it died an hour or two after the termination of the drill,—its death being, as sworn to by a veterinary surgeon, caused or accelerated by the fright.

The judge found a verdict for the plaintiff, assessing the value of the horse at 16*l.*

The defendant asked leave to appeal; and the learned judge said he thought it a very fit case for an appeal, but he imposed it as a condition that the defendant should pay the plaintiff's costs of the appeal in any event, and, in case the appeal should be unsuccessful, the judge should be taken to have certified for the

plaintiff's costs upon the higher scale, under 45 & 46 Vict. c. 57, s. 5.

Morton Smith, moved for an order in the nature of a mandamus to direct the judge to allow the appeal without the imposition of any condition. The statutory provision which requires the leave of the judge is s. 13 of the County Court Act, 1867 (30 & 31 Vict. c. 142), which enacts that "an appeal from the decision of a county court on the same grounds and subject to the same conditions as are provided by s. 14 of 13 & 14 Vict. c. 61, shall be allowed in all actions of ejectment, and in all actions in which the title to any corporeal or incorporeal hereditament shall have come in question; and, with the leave of the judge, an appeal shall be allowed in actions in which an appeal is not now allowed, if the judge shall think it reasonable and proper that such appeal should be allowed." The case being one which in the opinion of the judge was of sufficient difficulty and importance to make it reasonable and proper that an appeal should be allowed, it was not competent to him to impose a condition which virtually rendered an appeal impracticable.

[FIELD, J. To allow or not to allow an appeal where the value in dispute is under 20*l.*, is a matter for the discretion of the judge. In this case the judge thought the terms he imposed were reasonable and proper terms. What power have we to control his discretion?]

To make an appeal which the judge thinks is just and reasonable onerous, can scarcely be said to be a due exercise of discretion.

LORD COLERIDGE, C.J. I do not see that we have power to control the judge, in whom the legislature has vested an absolute discretion. A similar condition as to payment of costs by the party appealing was imposed in *London, Brighton, and South Coast Ry. Co.* v. *Watson* (1); and, though the case was argued very fully both in the Court of Common Pleas and in the Court of Appeal (2), no suggestion was made that the judge had no power to impose such a condition. And there have been numerous

(1) 3 C. P. D. 429. (2) 4 C. P. D. 118.

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cases since where the same thing has been done. The party who succeeds at the trial may have little interest in the question at issue, the mere value in dispute may be very insignificant; but to the appealing party a principle of vast importance may be involved. In the case referred to the sum in dispute was only an excess fare of 1*d.*

FIELD, J., concurred.

Order refused.

Solicitors for defendant: *Le Riche & Sons, for W. A. Watts, St. Ives.*

J. S.

July 3.

THE QUEEN ON THE PROSECUTION OF HOOLEY *v.* THE LICENSING JUSTICES OF PIREHILL NORTH, STAFFORDSHIRE.

Mandamus—Practice—Pleading—Return of Unconditional Compliance—Plea traversing Return—9 Anne, c. 20 [Revised Ed. Statutes, 9 Anne, c. 25]; 1 Wm. 4, c. 21; Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 77; 46 & 47 Vict. c. 49, s. 3; Order LIII., r. 9; Order LXVIII., r. 1; Order LXXII., r. 2.

The repeal by 46 & 47 Vict. c. 49, of 9 Anne, c. 20 [Revised Ed. Statutes, 9 Anne, c. 25] (in part), and 1 Wm. 4, c. 21, does not prevent the prosecutor from pleading to a return of unconditional compliance made to a writ of mandamus, inasmuch as the right of so pleading is part of the Crown practice, which is preserved by Order LXVIII., r. 1, and Order LXXII., r. 2.

MANDAMUS commanding the defendants to hold an adjournment of the general annual licensing meeting for the division of Pirehill North, Staffordshire, and to hear and determine an application by S. J. Hooley for the renewal of a licence or certificate to hold excise licences to sell by retail beer, cider, or wine to be consumed on the premises.

Return. That the defendants within a reasonable time after service of the writ held an adjournment of the annual general licensing meeting, and duly heard and determined the application.

Plea. That the defendants did not duly hear and determine the application. [Setting out at length the circumstances under

which the application was refused at the annual general licensing meeting, and an adjournment of it, and also at an adjourned meeting held in pursuance of the writ of mandamus.]

H. D. Greene, for the defendants, moved to set aside the plea on the ground that it was irregular.

First, where there is, as here, a return of unconditional compliance to a writ of mandamus, no plea is admissible. This was the practice before 9 Anne, c. 20, and the only remedy where it was sought to traverse the facts was to bring an action for a false return. The effect of 9 Anne, c. 20, and 1 Wm. 4, c. 21, s. 3, was to give this right of pleading to such a return in all cases of mandamus. Order LIII. contains various regulations as to writs of mandamus, and by r. 9, "When any return is made to a writ of mandamus other than an unconditional compliance therewith the applicant may plead to the return as to a statement of defence in an action." The effect of this rule is by implication to prevent any pleading to such a return, and further, by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49, s. 3, and schedule), the Acts 9 Anne, c. 20, and 1 Wm. 4, c. 21, s. 3, so far as is material to the present case, are repealed. The effect of this repeal and of Order LIII., r. 9, is to leave the right of pleading to a return to a mandamus as it was before 9 Anne, c. 20. Secondly, the plea ought to be struck out as embarrassing, as the prosecutors cannot raise any question of law by joining issue. The question is whether the justices in the circumstances had any power to refuse the licence.

Jelf, Q.C. (*Rose* with him), for the prosecution. As to the last point the plea is not embarrassing, for it merely sets out the facts of the case for the purpose of shewing that there was no bonâ fide compliance with the writ, leaving the defendants to traverse any of them they think proper. Secondly, the plea is not irregular. By Order LXVIII., r. 1, nothing in the rules save as expressly provided is to affect the procedure or practice in proceedings on the Crown side of the Queen's Bench Division, and by Order LXXII., r. 2, "where no other provision is made by the Acts or these rules, the present procedure and practice remain

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in force." These rules were intended to take the place of the old procedure, and if by any oversight anything is unprovided for the old practice is to remain. The rules of pleading in proceedings by mandamus had at the date of the rules become part of the practice of the Court, and notwithstanding the repeal of the Acts which first introduced them (9 Anne, c. 20, and 1 Wm. 4, c. 21) they are still in force.

MATHEW, J. This application must be refused. Under Order LIII., r. 9, when any return is made to a writ of mandamus other than an unconditional compliance therewith the applicant may plead to the return as if it were a writ of mandamus. Here there has been a return of obedience to the mandamus, and it is argued that the effect of the rule is to prohibit any plea to the return. It is difficult to understand why any such provision should be introduced into the rule, and no reason has been suggested why a plea to a return of unconditional compliance should be omitted from it, though there is no doubt that it is so omitted. Under the old practice there could have been a plea to such a return by virtue of two statutes, 9 Anne, c. 20, s. 1, and 1 Wm. 4, c. 21, s. 3. These statutes have however been repealed and nothing has been put in their place with respect to a return of non-compliance, and therefore it has been contended that the present plea is unwarranted and must be struck out. But on referring to Order LXVIII., r. 1, it appears that nothing in the rules save as expressly provided is to affect the procedure and practice on the Crown side of the Queen's Bench Division. It seems to me that the rule saves the proceeding in question, for nowhere else is there any express provision as to what shall be done in the particular case. The result is that the then existing procedure is maintained which was regulated by s. 77 of the Common Law Procedure Act, 1854, a section which has been since repealed by 46 & 47 Vict. c. 49. As to the second point, I think that we cannot interfere on the ground that the plea is embarrassing. It appears to me only an argumentative denial of the facts stated in the return. The application must be refused.

DAY, J. I concur. The practice of pleading to a return to a

writ of mandamus originated with the statutes of Anne and Wm. 4, but it had become the well-known and established practice and procedure on the 24th of October, 1883. It is quite true that on that day these statutes were repealed, that is, they were repealed by an Act which came into operation on that day, but I do not think it follows that the practice which had been established by those statutes was done away with by the repeal. On the contrary, I think that the words in Order LXVIII., r. 1, referred to by my brother Mathew, have the effect of preserving it. The procedure as to pleading is therefore that under the Common Law Procedure Act, 1854.

Upon the question as to whether the plea is embarrassing I agree with what has been said by my brother Mathew.

Application refused.

Solicitors for prosecution: *Robinson, Preston, & Stow, for Hollinshead & Moody, Tunstall.*

Solicitors for defendants: *Thomas White & Sons, for Hand, Blakiston, & Everett, Stafford.*

A. P. S.

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July 3.

THE LANCASHIRE AND CHESHIRE TELEPHONE EXCHANGE COMPANY, APPELLANTS; THE OVERSEERS OF MANCHESTER, RESPONDENTS.

Poor-rate—Telephone Company—Rateable Occupation—"Wayleaves"—Overhead Wires and Apparatus attached to Roofs and Chimneys of Houses.

A telephone company were possessed of an exchange by means of which subscribers could communicate by telephone with each other, and also of wires and telephonic apparatus unconnected with the exchange, for the use of persons renting them. For the purposes of this business they laid wires from their office to the business premises of their subscribers and also erected wires for the use of those who rented them. All these wires were overhead wires, and were carried from the office of the company to the different premises, being supported and steadied either by poles fixed in the ground or by being attached to the roofs, chimneys, or walls of some of the buildings over which they passed. The attachments were made in the case of a single wire by an iron spike driven into the building or by a bolt screwed into the ridge, or by an iron bracket nailed to the corner of the chimney to which the wire was attached, or in the case of a number of wires, by means of standards or ridge saddles attached to the roofs of the buildings and fastened by iron bolts or stays. The consent of the owners or occupiers of the land or buildings was given by agreements in which the company undertook to pay an annual rent and to remove the wires and attachments upon a certain notice. The company had no key of the outside doors, and could only obtain access to the roofs by the permission of the occupiers:—

Held, following *Electric Telegraph Company* v. *Overseers of Salford* (11 Ex. 181), that upon these facts there was proof of an occupation of land by the posts and wires of the company, and that they were rateable.

CASE for the opinion of the Court under 12 & 13 Vict. c. 45.

The appellants were a company incorporated under the Companies Acts, 1862 to 1880, for the purpose of establishing telephonic exchanges and communications in Lancashire and Cheshire, their principal office being at 38, Faulkner Street, Manchester. They were rated to the poor's rate by the respondents in respect of their occupation of land, telephone posts and wires in the township of Manchester, and were rated in respect of the whole of the telephone posts, standards or other supports or attachments afterwards referred to, and all the wires attached to them, taken as one entire system. They were also rated in the rate as occupiers of 38, Faulkner Street, but no

addition was made to the rate in respect of any telephone posts, standards, or other supports or attachments for wires, or wires attached to them. The appellants paid this latter rate.

The business carried on by the appellants within the township of Manchester was of two kinds: (*a*) the establishment and maintenance of a telephonic exchange by means of which any one subscriber to the exchange could communicate privately by telephone with any other subscriber; (*b*) the supply and erection generally of wires and telephonic apparatus (not in connection with the telephonic exchange) for the private use of firms and individuals paying a rent for the same.

For the purposes of this telephonic exchange business (*a*), the appellants from time to time laid wires within the respondents' township from the central office of the appellants to the business premises respectively of their subscribers. A wire was so laid from the central office (the centre of the exchange system) to the business premises of each subscriber and was furnished at either end with telephone and all other necessary telephonic apparatus, thereby enabling any subscriber to be placed in telephonic communication with any other subscriber through the central office.

For the purpose of the other branch (*b*) of their business, the appellants from time to time laid in the respondents' township other wires, and affixed telephones to them and all other necessary telephonic apparatus. These wires and apparatus were used exclusively by the renters of them. In both branches of the business, by agreement with the subscribers and renters, the appellants kept the wires and apparatus in working order, and for that purpose had free access to the subscribers' and renters' premises, the wires and apparatus remaining the property of the company, and the subscribers or renters paying an annual sum for their use.

All the wires laid by the appellants were overhead wires. Those laid for the (*a*) branch of their business were carried up through the roof of the appellants' central office, thence over buildings, streets, yards, and plots of land not built on in the respondents' township, to the respective premises of the subscribers, where they were for the most part led through the roofs to the interior of the premises. The wires laid for the (*b*) branch of the business were

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in the same way carried over buildings, streets, yards, and plots of land not built on in the respondents' township, and were let down at either end into such premises of the renters as it was desired to connect.

These overhead wires were supported and steadied either by poles fixed in the ground, or more generally by being attached to the roofs, chimneys, or walls of some of the buildings over which they passed. The attachments to buildings were made, in the case of a single wire, by an iron spike driven into the building or by a bolt screwed into the lead of the ridge, or by an iron bracket nailed to the corner of the chimney to one of which the wire was attached, and in the case of a number of wires, by means of standards or ridge saddles attached to the roofs of the buildings, the standards being fixed by iron bolts and stayed by wire stays, the ridge saddles being made to fit the lead ridge and fastened by stays.

All these attachments could be easily removed without damage to the buildings, and the appellants did from time to time change them from one point of attachment to another on the same building. The consent of the owners or occupiers of land into which poles were fixed, or buildings to which attachments were made, was in all cases given in agreements, for the most part in printed forms called "wayleaves," by which the appellants undertook to pay a small annual sum to the owners or occupiers as rent or acknowledgment, to make good any damage done to the property, and to remove the wires and attachments upon a certain notice.

The majority of the buildings to which the attachments were made were several storeys high, some of them warehouses, and the appellants obtained access to the roofs by ascending through the interior of the buildings, permission being in all cases first obtained from the owners or occupiers. The outer doors of the various buildings were locked and fastened except in the usual business hours, and the appellants' servants were then unable to get into or on the buildings from the interior, as they were in no single instance furnished with a key of the outside door of the buildings or any other way of obtaining admittance to them. Similarly the practice of the appellants when wishing to have

access to the poles fixed in the ground was to obtain permission from the owners or occupiers.

The questions for the opinion of the Court were :—

1. Were the appellants' telephone posts, standards, ridge saddles and other attachments and supports for wires, and the wires attached to them, rateable to the poor-rate, and if so who was liable for the rate?

2. If they were rateable, did they constitute a separate rateable tenement, or did they add to the rateable value of the premises to which they were attached?

3. If the appellants were rateable, how was the proper amount at which they ought to be assessed to be ascertained?

R. E. Webster, Q.C. (*R. Henn Collins, Q.C.*, and *Bradbury*, with him), for the appellants. The appellants are not rateable in respect of the telephone posts and wires described in the case. The mere fact of the attachment of wires to a house, the owner not parting with the exclusive possession of any part of the building, does not create a rateable hereditament. There may no doubt be a rateable occupation by means of posts fixed in the ground as in *Electric Telegraph Company* v. *Overseers of Salford* (1), where a telegraph company were held rateable in respect of their posts and wires placed along a line of railway. But there must be an exclusive occupation; here each renter has the exclusive use of his wire, and if any one is rateable, he is. The grant of the privilege of fixing certain apparatus upon the roof of a house to be removed upon the requisition of the grantors does not operate as a demise, but only confers an easement. This is established by *Smith* v. *Lambeth Assessment Committee* (2), where there was a licence to erect bookstalls upon a railway platform. If the pipes of a waterworks company were put down upon the terms that they might be moved at the will of the owner of the soil they would not be rateable. With reference to *Electric Telegraph Company* v. *Overseers of Salford*, Blackburn, J. (3), says that the case does not decide that an easement can be rated. In *Grant* v. *Oxford Local Board* (4), the University Boat Club were held to be not rateable in respect of posts in the bed of the river

(1) 11 Ex. 181.
(2) 9 Q. B. D. 585; 10 Q. B. D. 327.
(3) Law Rep. 3 Q. B. 354.
(4) Law Rep. 4 Q. B. 13.

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to which they moored their barge, the reason being that the licence did not conclusively shew an exclusive interest. Exclusive use of the whole of the matter of a rateable hereditament is equivalent to occupation, but the use of part of it is not occupation. This doctrine is further illustrated in *Cory* v. *Bristow* (1); *Reg.* v. *St. Pancras* (2); *Smith* v. *St. Michael, Cambridge.* (3)

Ambrose, Q.C. (*Smyly*, with him), for the respondents. All the essentials of rateable occupation are to be found in the present case. No temporary occupation is intended; the ends of the telephone wires are fastened to supports annexed to the land.

[MATHEW, J. Would a wire rope working a ferry boat be rateable?]

Yes; there is no reason why it should not. The present case cannot be distinguished from those of gas and water pipes.

[He was stopped.]

MATHEW, J. We must decline to answer the third question asked in the case; as this is not a Court of advice. I now proceed to deal with the two others. With regard to the posts and wires, I am of opinion that the appellants are rateable, and that the case is concluded by *Electric Telegraph Company* v. *Overseers of Salford.* (4) There the question was whether telegraph posts and wires were capable of a rateable occupation, and the same point was made as in the present case, that there was only an easement as distinct from an actual interest in the soil. The Court held that the posts and wires were rateable, and I cannot distinguish that case from this. Here what is sought to be rated is an arrangement of wires used for an analogous purpose to that of the telegraph wires, and I cannot draw any distinction in the principle which ought to govern the two cases. We were referred to cases on the verge of the line where occupation ceases and mere enjoyment begins, where it has been held that there is no rateable occupation, and it has been argued that here there is only a series of quasi easements, of enjoyments by licence only, and stress has been laid upon the mode in which the wires are attached to the roofs. But this is not a mere licence to use the

(1) 2 App. Cas. 262.
(2) 2 Q. B. D. 581.
(3) 3 E. & E. 383.
(4) 11 Ex. 181.

roof on particular occasions, but an exclusive occupation, limited in character I admit, but exclusive in each case. Where the wire is attached to a roof that part of the roof is used exclusively for its support. Where the ridge saddle is fitted on the roof, that part of the roof where the ridge saddle is fitted on is used exclusively for the purpose of maintaining the wires by that ridge saddle, and so where the wire is upon a post, the post and the land to which it is fastened are used exclusively for the purpose of supporting the wire. It is not a casual and occasional but an exclusive and permanent occupation. In *Watkins* v. *Overseers of Milton-next-Gravesend* (1), one of the cases relied on by the appellants, the person sought to be rated as occupier was one who enjoyed the right of mooring a barge to permanent moorings in the river. It was held that he was not the occupier of the moorings, having only a licence to use them, but that the real occupier was the owner of the moorings. *Cory* v. *Bristow* (2) is an illustration of the same principle. There the same sort of property was used, but the person who used it was also the owner and he was held to be properly assessed. Then there is *Smith* v. *Lambeth Assessment Committee.* (3) In that case no doubt the distinction between mere enjoyment and rateable occupation was an exceedingly narrow one. There, although there was no legal right to the exclusive use of any part of the platform, there was practically an exclusive use, but the fact that there was no legal right to an exclusive use was held to be sufficient ground for holding that the property was not rateable. Was the use of the different supports and attachments meant in this case to be exclusive or not? It seems clear that it was never intended by the parties that any part of this complicated structure should be interfered with by the owner or tenant of the buildings. It is true that the company have not the right to constant access to see that everything is in order—it is not necessary that they should have this right. But there is a permanent use of the whole structure, and by the terms of the different instruments the attachments and supports are declared to be the property of the company. Mr. Webster referred to the agreements to shew that the enjoyment only amounted to an easement. But the

(1) Law Rep 3 Q. B. 350. (2) 2 App. Cas. 262.
(3) 9 Q. B. D. 585; 10 Q. B. D. 327.

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question is not so much upon the terms of these documents, but what is going on under them. What is going on appears to be an enjoyment of the whole system for the purpose of conveying telephonic messages. The respondents are entitled to our judgment.

DAY, J., concurred.

Judgment for the respondents.

Solicitors for appellants: *Pritchard, Englefield & Co., for Grundy, Kershaw & Co., Manchester.*

Solicitors for respondents: *Johnson & Weatherall, for A. Lings, Manchester.*

A. P. S.

March 13.

[IN THE COURT OF APPEAL.]

THE SEA INSURANCE COMPANY *v.* HADDEN & WAINWRIGHT.

Insurance (Marine)—Policy on Ship—Policy on Freight—Constructive Total Loss by Collision — Recovery of Damages from Owner of Ship in default—Claim by Underwriter on Ship after Payment of Sum insured to Compensation received for Loss of Freight—Subrogation.

Freight to be earned under a charterparty is not an incident to the ownership of the vessel; and therefore although an underwriter of a policy of insurance upon the vessel herself becomes, by abandonment to him upon a constructive total loss happening through the fault of another vessel, entitled after payment of the sum secured by the policy to every benefit accruing from the ownership of the insured vessel, he cannot claim any part of the damages recovered from the owners of the wrongdoing vessel on account of loss of freight intended to be earned by the insured vessel.

The defendants being owners of a ship chartered her upon a voyage, and insured her with the plaintiffs, and they insured the freight intended to be earned with other underwriters. The defendants' ship became a constructive total loss through a collision with the C. occasioned by negligence in navigating the latter vessel. The plaintiffs settled with the defendants for a total loss of the insured ship. No freight was earned under the charterparty. Afterwards the defendants recovered from the owners of the C. damages for the loss of their ship and of her freight:—

Held, that the plaintiffs were not entitled to any part of the damages recovered from the owners of the C. on account of the loss of the freight intended to be earned by the defendants' ship.

THE plaintiffs were an insurance company incorporated under the Companies Acts, 1862, 1867, and having their office in Liver-

pool. The *Queen of the East* was a ship managed by a member of the defendants' firm who also carried on business in Liverpool, and they were sued in the present action as her owners. On the 30th of March, 1881, the *Queen of the East* was chartered for a voyage from Liverpool to Cardiff, there to take on board a cargo of coals for Bahia: freight was to be paid at the rate of 21*s.* per ton of cargo. On the 13th of April, 1881, the defendants effected with the plaintiffs a policy of insurance on hull for 1000*l.*, the ship being valued at 4000*l.*, at and from Liverpool (in tow) to Cardiff, while there, and thence to Bahia, and for thirty days in port after arrival, against the usual perils, which included perils of the seas and all other perils, losses, and misfortunes that should come to the hurt, detriment, or damage of the subject-matter of insurance. The *Queen of the East* sailed from Liverpool to Cardiff in ballast and in tow of a tug; but before she reached Cardiff, and whilst she was covered by the policy, a collision occurred between her and a steamship called the *Cassandra*, whereby the *Queen of the East* was cut down to the water's edge. She put into Milford Haven, where she was temporarily repaired: she was afterwards brought round to Liverpool, where it was found that she was not worth repairing: accordingly she was put up for sale by auction, and she was sold for 1860*l.* On the 4th of May, 1881, the defendants gave notice of abandonment to the underwriters: it was refused, but ultimately the underwriters settled on the basis of a constructive total loss. The loss having been adjusted, the plaintiffs paid the amount found to be due from them by the average statement, namely, 629*l.* 15*s.* 7*d.*, credit having been given for the proceeds of the sale of the ship. Subsequently the owners of the *Cassandra* instituted proceedings in the Admiralty Division of the High Court of Justice against the present defendants as owners of the *Queen of the East*, and the defendants counter-claimed against the owners of the *Cassandra* for the damage caused to the *Queen of the East* by the collision, and the owners of the *Cassandra* admitted their liability for this damage subject to a reference to the registrar and merchants. The defendants received from the owners of the *Cassandra* a sum of money, as compensation for loss of the *Queen of the East* and the freight to be earned by her upon the voyage mentioned in the charterparty. The plaintiffs then commenced the present

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action to recover the sum of 880*l.* 19*s.*: this was made up of two items, namely, 630*l.* 11*s.* 9*d.*, being the proportion of damages recovered by the defendants in respect of the ship, to which the plaintiffs as insurers to the extent of 1000*l.*, upon the ship valued at 4000*l.*, claimed to be entitled, and 250*l.* 7*s.* 3*d.*, being one-fourth of the sum credited to freight, to wit, 1001*l.* 8*s.* 11*d.* The defendants paid into court the sum of 630*l.* 11*s.* 9*d.*, but they denied any liability to pay to the plaintiffs the sum of 250*l.* 7*s.* 3*d.* The defendants further pleaded as to the latter sum that they had effected a policy of insurance upon the freight with persons other than the plaintiffs, and that the insurers of freight upon the happening of the loss paid to the defendants the amount due according to the terms of the policy, and the defendants having received this payment in respect of a total loss of freight paid to the insurers before action 500*l.* 14*s.* 6*d.*, being part of the said sum of 1001*l.* 8*s.* 11*d.*

The action came on for trial before Day, J., without a jury, and that learned judge ultimately gave judgment for the defendants.

The plaintiffs appealed.

Cohen, Q.C., and *Gorell Barnes* (*C. Russell, Q.C.*, with them), for the plaintiffs. The question to be determined is as to what extent underwriters are entitled to be subrogated to the rights of the assured. No freight was earned by the *Queen of the East*, but the underwriters upon her hull are entitled to the sum of money paid to her owners by way of compensation for her inability to earn freight. For the plaintiffs it is contended that if the underwriters on the hull pay for a total loss, and if the assured afterwards recover damages for both the loss of the ship and also the loss of the freight, the underwriters are entitled to the whole of the damages. The claim of the underwriters arises in the present case from the act of the owners, who have given notice of abandonment and have received payment for a constructive total loss.

[BRETT, M.R. Will not the same question arise when an actual total loss has happened?]

At all events, the owners need not have claimed payment from

the underwriters: the owners would in that case have been entitled to the whole amount recovered from the wrongdoers. The rights of the owners against the underwriters on the one hand and against the wrongdoers on the other may be different: suppose that a ship has been injured by the unskilful navigation of another ship: the owner of the injured ship can recover from the owner of the ship in fault and can keep for his own benefit the whole cost of repairing her; but if he proceeds against the underwriters, he can recover only subject to a deduction of one-third new for old. It is, therefore, no answer to the claim of the plaintiffs as underwriters that upon their contention the defendants as owners would have been in a better position, if they had in the first instance sued the owners of the wrongdoing ship, the *Cassandra*. The question arising in the present case has never been determined, but the logical result of the reasoning of the judges in *North of England Insurance Association* v. *Armstrong* (1) is that the underwriter upon the hull who has paid for a total loss is entitled to the sum recovered by the owner of the ship as compensation for loss of freight. In *Simpson* v. *Thomson* (2), it was laid down by Lord Blackburn that the right to receive payment of freight accruing due but not earned at the time of the disaster is incident to the property in the ship, and it therefore passes to the underwriters because the ship has become their property. That principle applies to the present case in favour of the plaintiffs. It must be admitted on behalf of the plaintiffs that upon the argument for them the underwriters of the ship herself are entitled to the sum paid on account of the loss of freight in preference to the underwriters of the freight; but this result follows from the fact that freight is incident to the ownership of the ship. No freight having been earned, and it having become impossible to earn the chartered freight, there was nothing which could pass by any abandonment to the underwriters of the freight: *Rankin* v. *Potter* (3). It was held in *Stewart* v. *Greenock Marine Insurance Company* (4) that the underwriters of a ship, which had become a constructive total loss, were entitled upon payment to the benefit of freight actually

(1) Law Rep. 5 Q. B. 244.
(2) 3 App. Cas. 279, at p. 292.
(3) Law Rep. 6 H. L. C. 83.
(4) 2 H. L. C. 159.

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earned. In the present case no freight had been earned: this is the only distinction between that case and the present; and it is immaterial. Freight is incident to the ownership of the ship, and the right to recover it passes with an assignment of her: *Morrison* v. *Parsons* (1). It is unnecessary to rest this case merely upon the doctrine of subrogation; for it is not to be forgotten that the plaintiffs, who are underwriters on the ship, claim all the damages recovered in the Admiralty Division by the defendants, who are her owners, for her loss from the owners of the *Cassandra*, and the contention on their behalf is justified by the rule of law, according to which all the property in a ship and all the benefits and advantages incident to her pass to the underwriters upon the abandonment of her. If after the abandonment by the defendants the *Queen of the East* had been repaired, and had proceeded to her port of destination, with the cargo on board, and thereby had earned the freight mentioned in the charterparty, it would have belonged to the defendants, being underwriters on the ship: *Case* v. *Davidson* (2): *Randal* v. *Cockran* (3). The question as to earning freight comes into calculation in determining whether the ship shall be repaired, or whether she shall be abandoned to the underwriters. An underwriter or insurer is entitled to the benefit of every contract whereby the loss suffered by the assured is diminished: *Darrell* v. *Tibbits* (4): *Castellain* v. *Preston* (5).

C. Crompton, Q.C., and *W. R. Kennedy* for the defendants. It is a startling proposition that underwriters on freight shall have no salvage, and that all the salvage shall go to the underwriters on the ship. The case for the plaintiffs is based both on the doctrine of subrogation, and also on the transmission of the ownership of the vessel upon abandonment: but a contract to carry goods is not incident to the ownership of a vessel and may be detached from it: therefore the benefit of the contract contained in the charterparty, which was unfulfilled at the time of the loss, did not pass to the underwriters on the ship: *Hickie* v. *Rodocanachi* (6). It may be that freight is payable to whoever is the owner of the

(1) 2 Taunt. 407.
(2) 5 M. & S. 79.
(3) 1 Ves. Sen. 98.
(4) 5 Q. B. D. 560.
(5) 11 Q. B. D. 380.
(6) 4 H. & N. 455.

ship at the time when it is earned: but even if the underwriters on the ship must be deemed to become owners upon the abandonment, no freight was earned by the *Queen of the East* under the charterparty; and therefore no compensation for loss of freight is due to them: *Keith* v. *Burrows* (1). The counsel for the plaintiffs have relied upon the opinion of Lord Blackburn in *Simpson* v. *Thomson* (2); but the decision in that case is really adverse to their contention. The question between the parties ought to be regarded from the point of view of the underwriters on freight: insurance is a contract of indemnity; that is the key to all difficulties: the argument for the plaintiffs is a violation of the principle of indemnity. In *Case* v. *Davidson* (3) and *Stewart* v. *Greenock Marine Insurance Company* (4) the freight had been actually earned. Suppose that the defendants had not paid over to the underwriters on freight what they received from the owners of the *Cassandra* as compensation for loss of freight: upon what ground could the present defendants have successfully disputed the claim of the underwriters on freight to recover it?

Cohen, Q.C., in reply. No doubt insurance is a contract of indemnity: but insurance is subject to certain rules. It may be a little startling that upon the contention for the plaintiffs the insurers may be gainers and the assured may be losers; but if the assured elect to claim from the underwriters, knowing that they have a remedy against the wrongdoer, the underwriters become entitled to all moneys received by the owners on account of the ship.

BRETT, M.R. In this case certain shipowners had insured their ship, and also had insured the freight to be earned under a charterparty, but with different underwriters. The ship was damaged by a collision, and the injury was so serious that she was abandoned to the underwriters on ship. The property therefore on the ship passed to the underwriters on ship as from the date of the injury. The exact time—whether it was before or after the abandonment—seems to me immaterial, but the owners of the injured ship sued the owners of the other ship with which

(1) 2 App. Cas. 636.
(2) 3 App. Cas. 279.
(3) 5 M. & S. 79.
(4) 2 H. L. C. 159.

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she had come into collision, in the Admiralty Division, and the ground of action was that this damage by collision had given them a maritime lien on the wrongdoing ship. What did they sue for in the Admiralty Division? They sued for the injury which they had suffered by the negligence of the wrongdoing ship. What had they suffered? They had suffered the damage done to their own ship. It might have been an actual total loss. Here as between the two ships it was not a total loss, for the defendants' ship had not sunk to the bottom. They had suffered another loss, because they had a contract by charterparty, and by the negligence of the servants of the owner of the other ship they had been deprived of the power which they had under that contract to make a profit.

The underwriters on ship have sued the shipowners to recover what the shipowners have obtained by way of salvage in consequence of the loss of the ship, and the underwriters having paid to the shipowners the value of the ship, the owners of the ship cannot keep anything which they get by way of salvage on the ship. That must go to the underwriters; but that is all to which the underwriters on ship are entitled; that is the salvage which has come to the hands of the shipowners in respect of the loss of the ship. From this point of view, the proposition must be thus stated: Is a contract of carriage, that is, a contract of affreightment, a salvage upon the loss of the ship? The moment an underwriter has paid for the total loss of the ship, if the contract of affreightment is a salvage, he is entitled to the benefit of that contract. If that is so, he will be entitled to sue upon that contract although not in his own name perhaps under the former mode of administering the law. There is no authority, however, for saying that he can sue upon the contract. If the contract had passed to him, he could sue for any breach of that contract; whereas it seems to me clear that he cannot. The contract does not pass to him. Therefore, if this claim by the underwriters is put forward under the doctrine that the assured is obliged to hand over all the salvage which comes to his hands in respect of the loss, that contract does not pass to the underwriters by way of salvage. But it is said that the rights under that contract pass to him, because they are incident to the ownership of the ship.

The contract of affreightment is clearly no part of the ship. Therefore it must be an incident of the ship in some other way. Is it an incident of ownership that there should be a contract of affreightment? An incident of ownership in that sense means that which is an incident under all circumstances: whether there is or is not a contract of affreightment, is a mere accident as regards the ship. It has no concern with the ownership. It is an independent contract of which the ship is not the subject matter. The subject matter of the contract is the carriage of goods. The carriage of the goods does not, as Lord Bramwell pointed out in *Hickie* v. *Rodocanachi* (1), increase the value of the ship. The absence of the contract of affreightment does not diminish the value of the ship. The existence of it does not add to the value of the ship. It is no part of the ship. It is independent of the ship, although it can only be fulfilled by means of that ship. Therefore it is not within the definitions of those contracts which are said to be incident to the ownership. The contracts, which are said to be incident to the ownership and which pass with the ownership, are contracts of which the ship is the subject matter, such as that which I will now put. If there be a contract to repair a ship on her return home from the voyage or to paint her, upon the terms that the money is to be paid the moment the contract is made, then, there being nothing to do under that contract except to fulfil it with regard to the ship, I think that the right to have the ship painted or repaired when she shall come home will pass with the ownership of the ship. The man who has contracted to repair or paint her, has received everything which he has to receive, and he has nothing to do but to perform his work. The ship is the subject matter of the contract. In the present case the ship is not the subject matter of the contract. If authority is desired for the question whether the freight is an incident of the ship and passes together with the ownership of her, reference may be made to what was said as to the argument of the present Lord Blackburn by Lord Bramwell while he was delivering the judgment of the whole Court of Exchequer in *Hickie* v. *Rodocanachi* (2):—"He said that a contract of insurance was one of indemnity, that an insurer was in the

(1) 4 H. & N. 455, at p. 466. (2) 4 H. & N. 455, at pp. 465, 466.

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nature of a surety, and entitled to the benefit of all the securities the insured possessed. But in truth this argument tells against him. The common insurance on a ship is in no way concerned with the freight in course of being earned. It is an insurance on the absolute value, not on that and the vessel's adventitious advantages. If any question of the value of the ship arose, the insured could not include the freight as an item in the calculation, any more than he could the prospect of winning a wager which he had made, that she would arrive at her port of destination. It is the *goods*, not the *ship*, which are increased in value by the arrival of the ship, or rather *their* arrival, and if they arrive the freight is earned. But the matter needs no argument, it is enough to refer to the practice of separate insurance on freight." That is to say, by the practice of merchants, acknowledged by the law, the freight and the ship are two separate things, shewn by the undisputed fact that the two insurances are separate, "If then," Lord Bramwell proceeds to say, "the loss of freight is no part of the loss in the loss of the ship, consequently the insurer of ship ought to have no benefit from the earning of freight unless he helps to earn it." I will deal with that part of it presently. At the end of the judgment he says (1), "On these grounds we are satisfied that the captain in such a case as the present acts for the owners of the ship and not for the underwriters; and that they are not entitled to any benefit from the freight acquired," (now come the words which are material) "that the underwriters may indeed be entitled to advantages attached to the ship, but not to those arising from contracts, the fulfilment of which can be, and is, detached from the ship." The contract of affreightment is one which can be, and often is, detached from the ownership of the ship; that is to say, that the owner of the ship may under certain circumstances fulfil the original contract, if it can be considered as still being in existence, or may make a new contract, which is to be fulfilled by means of another ship. That seems to me to be strong authority for saying that those two things, the freight to be earned by the contract of carriage, and the ship herself, are not so attached together, that one can be said to be, within the meaning of the rules laid down, an incident of the

(1) 4 H. & N. at p. 468.

other: a contract of affreightment is not an incident to the ownership of the ship: it is an independent contract which the owner of the ship may or may not enter into. What is pointed out by the defendant's counsel seems to me to be very strong to shew that these are separate things. If there be an insurance of the ship to one underwriter and an insurance of the freight to another, whatever is a salvage in respect of the ship if she is lost, and if the underwriter pays for her as a total loss, goes to the underwriter on ship; but whatever is a salvage in respect of the freight, for which the underwriter on freight has to pay as a total loss, ought to go to him. In the present case what are the damages recovered? Some of them are damages recovered in respect of the value of the ship; that is a salvage in respect of the loss of the ship: that goes to the underwriters on ship. But what are the other damages? The others are a salvage in respect of the loss of freight. To whom ought that to go? To the underwriters on freight. Why? Because the freight and the ship are not so joined together that a salvage on the loss of freight is a salvage on the loss of the ship. It is not. That seems to be almost conclusive here. The underwriters on the ship cannot recover this compensation for loss of freight. A contract of insurance on freight certainly does not pass to the underwriters on ship, although they have paid for a total loss of the ship. The counsel for the plaintiffs cannot pretend to say that the underwriters on the ship could either in their own name or in the name of the assured sue the underwriters of freight for the loss of the freight. It is patent and clear. And for the same reason it seems to me, after having heard this case fully discussed, that this recovery of damages in respect of the loss of freight—a separate recovery in respect of a separate and different loss from the loss of the ship—is not a salvage in respect of the loss of the ship: therefore it ought not to go to the underwriters on the ship. It is said—and a great deal of the argument for the plaintiffs is founded upon it—that where the ownership of the ship is transferred, either by sale or by abandonment to underwriters, after the voyage has commenced, and where the goods which have been shipped on board are carried to their destination by the underwriters, the underwriters or the vendee of the ship can sue the owner of the goods for freight. It seems

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to me that that falls under a different head of law, namely, that the goods having been carried to their destination, the owner of those goods cannot be allowed to have the benefit of the carriage of the goods on board the ship without paying for it. To whom is he to pay? The law of England says that he is to pay somebody, and therefore the owner of the goods must pay the person who is the owner of the ship, at the moment when the payment for carrying the goods to their destination becomes due; that is, the moment when the goods are delivered; and inasmuch as that cannot be the former owner of the ship, it must be the existing owner of the ship. It is a somewhat stretched principle of law, which has been introduced perhaps from the custom of merchants. It does not seem to me that the payment of freight under these circumstances is made under the original contract of affreightment. It is a payment for work and labour done, and the original contract of affreightment, where it exists, is invariably taken by the tribunal which tries the question as the measure of the value of the work and labour done. The right to the freight earned under the circumstances to which I have alluded, arises under a totally different head of law, and therefore does not alter the rights which arise under this contract of insurance.

I think, therefore, that the judgment given by Day, J., was right, and ought to be affirmed.

BAGGALLAY, L.J. Agreeing with the conclusion to which the Master of the Rolls has arrived, and also with the reasons which he has given, I propose to add but very few words, and those are with reference to the argument pressed upon us in a very pointed and clear manner by the defendants' counsel. Now the facts of the case may be very concisely stated. The defendants, the shipowners, had insured both this ship and the freight with different insurers. There was a total loss by reason of an abandonment, and they received the full amount of insurance from both sets of underwriters. In that state of things they took proceedings in the Admiralty Division and recovered a considerable sum of money from the owners of the vessel which caused the abandonment; this sum of money was divisible into two portions; one representing the loss of the ship, and the other representing

the loss of the freight. As regards the loss of the ship, the amount apportioned in respect of that has either been paid, or has been brought into Court. The defendants have fully recognised the right of the insurers of the ship to receive their proportion. They have also recognised the right of the insurers of the freight to receive the other portion, and they have paid it over. The claim in the present action is that the shipowners shall pay it over again a second time, on the ground, I presume, that they paid it to the improper persons in the first instance. As it has been put in argument, suppose that so much of the amount assessed by the registrar and merchants as represents compensation for the loss of freight had not been paid over to the insurers on freight, we should then have two parties claiming it, each by virtue of their having paid sums of money in respect of the insurance. In that state of the case, as it was put in argument, and I think with very great force, upon what ground are the insurers of freight to be deprived of their right to be recouped the sum of money which under ordinary principles of insurance law they would be entitled to? It appears to me it would be contrary to the principles of *Castellain* v. *Preston* (1) if that view were adopted. At the same time, if we find authority supporting this contention, we must pay respect to the decisions. Many decisions have been referred to, several of them in the House of Lords, by which, of course, we should feel ourselves bound. But none of those cases, when examined, carry the principle to the extent which has been contended for on behalf of the plaintiffs. In *Stewart* v. *Greenock Marine Insurance Company* (2) the freight had been earned before abandonment. It distinctly appears from the statement of the facts, that first of all the vessel had received a certain amount of damage by collision with an iceberg, and afterwards, in going up the river at Liverpool into the docks, met with the accident which led her to being abandoned. But she was not abandoned until after the cargo was discharged. Another case very much relied upon on the part of the plaintiffs, *Simpson* v. *Thomson* (3), when it comes to be examined, really went very

(1) 11 Q. B. D. 380. (2) 2 H. L. C. 159.

(3) 3 App. Cas. 279.

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much on the circumstances of the case, and all that can be relied upon in the case were certain dicta, because the actual decision was adverse to the claim of the plaintiffs. I think it desirable to add only these few observations on part of the case. As I have said before, I entirely agree with what the Master of the Rolls has said.

LINDLEY, L.J. I am of the same opinion, and I will add only a few observations. It appears to me that it lies upon the plaintiffs in this case, who are the underwriters of the ship, to shew on what principle they are entitled to the sum of money, which has been assessed in the Admiralty Division by way of compensation for the loss of freight. The plaintiffs' claim is put in two ways, and I will consider it from both points of view.

Let us look at it, first of all, apart from the question of the ownership of the ship. Let us look at it simply as a contract of insurance. Looked at from that point of view, it is obvious that an insurance on ship and an insurance on freight are two totally different things, and when we look at it as a mere matter of insurance apart from the ownership of the ship, the ship does not include freight at all, and an insurer of a ship is not liable for loss of freight. Is it possible to hold that an insurer on ship is entitled to anything which is got by the shipowner in respect of loss of freight? Why should he? He is entitled to every benefit to which the assured is entitled in respect of the thing to which the contract of insurance relates, but to nothing more. If we look at the question apart from ownership, the argument of the defendants' counsel is unanswerable.

Then the plaintiffs' claim is put in another way quite apart from that which I have disposed of. It is contended that the insurer on ship, having regard to the abandonment, has become the owner of the ship, and as the owner of the ship, he is entitled to all the freight, and entitled not only to all the freight, but also to everything which the owner of the ship may recover by way of compensation for being deprived of the power of earning freight. I do not wish to repeat what the Master of the Rolls has said. I agree with it, and will make only one observation

in addition. When do the underwriters on the ship become the owners of the ship? It is upon the loss: their title accrues then, if at all. But at that moment what becomes of the freight? The freight is already subject to the rights of other persons. The freight has been insured with other underwriters, and the argument is that because the underwriters on the ship are entitled to the ship, therefore they are entitled to the freight, all the contracts to which the freight has been already subject being left out of sight. It appears to me that the underwriters of the ship in that point of view are claiming more than they can possibly establish a right to. They are asking for the freight on one hand, and on the other hand they are repudiating the rights of those who have issued the policy on the freight as distinguished from the ship.

In neither way can the underwriters of the ship acquire the money which has been awarded to the owner of the ship in respect of the freight as distinguished from the ship. It appears to me the decision was right, and that the appeal ought to be dismissed.

Judgment for the defendants.

Solicitors for plaintiffs: *Field, Roscoe & Co. for Bateson, Bright & Warr, Liverpool.*

Solicitors for defendants: *Gregory, Rowcliffes & Co. for Stone, Fletcher & Hull, Liverpool.*

J. E. H.

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June 20.

[IN THE COURT OF APPEAL.]

EX PARTE REVELL. IN RE TOLLEMACHE. (No. 1.)

Bankruptcy—Proof of Debt—Evidence—Admissibility—Bankrupt's Statement of Affairs—Judgment Debt—Inquiry into Consideration.

An admission of a debt, contained in a bankrupt's statement of his affairs made after the commencement of the bankruptcy proceedings, is not evidence as against his creditors of the existence of a debt, even though the statement was verified by his oath (without cross-examination), and he has since died.

The Court of Bankruptcy is not conclusively bound by a judgment for a debt, but has power, on a claim to prove the debt in the bankruptcy of the judgment debtor, to inquire into the consideration for the debt.

But, *quære*, whether it will do so unless a primâ facie case of suspicion is shewn.

APPEAL from the admission of a proof by Mr. Registrar Pepys.

On the 2nd of September, 1842, a fiat in bankruptcy was issued against the Hon. W. L. F. Tollemache, commonly called Lord Huntingtower, as a horse-dealer and coach proprietor. There being practically no assets, no dividend was declared in the bankruptcy till many years afterwards. The bankrupt died on the 21st of December, 1872. In 1878 his father, the Earl of Dysart, died, and thereupon a considerable sum of money became available for the creditors. In December, 1883, a proof for 2250*l.* was tendered in the bankruptcy by J. N. Edwards. In his affidavit of proof he deposed to the following effect: He was the son and the sole executor of the will of Henry Edwards, late of St. Alban's, who was the same person as H. Edwards, who was referred to in the bankrupt's statement of his affairs as a creditor on his estate for the sum of 1500*l.* Henry Edwards died on the 22nd of December, 1874. The bankrupt, before and at the date of a promissory note for 2250*l.*, dated on or about the 7th of October, 1841, was indebted to Henry Edwards in the sum of 2250*l.* and interest thereon, the particulars of the indebtedness being set forth in an account-book in his father's handwriting which the deponent had discovered among his father's papers. In respect of this indebtedness the bankrupt on or about the 7th of October, 1841, gave the promissory note to H. Edwards. The deponent had discovered

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that one Henry Phillips, who for many years acted as solicitor for his father, brought an action in his own name against the bankrupt on the promissory note, and on the 26th of January, 1842, recovered judgment for 2262*l.* 10*s.*, debt and interest, and 38*l.* 7*s.* 6*d.* costs. The deponent said he was informed and believed that Phillips lent 200*l.* to his father on the promissory note, and he had every reason to believe that that advance was made to enable Phillips to sue the bankrupt in his own name, his father being on friendly terms with the bankrupt, and that Phillips was a trustee for his father of the judgment and the proceeds thereof. He had made diligent search among his father's papers, but had not been able to discover the promissory note, or any reference to it, except the account-book already mentioned, and a letter which purported to be an application by Phillips to H. Edwards, giving him notice of the dishonour of the note, and demanding immediate payment of the 2250*l.* The deponent said that at the date of the bankruptcy he was only three years of age, but that since that time and up to the death of his father the subject of Lord Huntingtower's bankruptcy was a frequent matter of conversation in the deponent's hearing in his late father's family circle. His father used to allude to the loss which he had sustained in consequence of the bankruptcy.

It appeared also that in the register of judgments in the Court of Common Pleas for the year 1842 there was an entry of a judgment recovered in an action in the Court of Exchequer on the 26th of January, 1842, by Henry Phillips against Lord Huntingtower for damages 2262*l.* 10*s.*, and costs 38*l.* 7*s.* 6*d.*

Mr. Hodding, the claimant's solicitor, deposed that he had discovered two books which formerly belonged to and were kept by Phillips, and were in the possession of William Gibson, the administrator of Phillips, who died on the 26th of March, 1875, viz., a cash-book of Phillips, which contained entries of cash transactions in the years 1841, 1842, and 1843; and a letter-book containing copies of letters written by Phillips to his clients during the same years. In the cash-book, under the date of the 6th of December, 1841, there was this entry: "Lent Mr. Edwards on bill of L. H., 200*l.*" Under the dates of 11th of December,

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1841, and 3rd, 6th, 14th, and 18th of January, 1842, there were in the second book copies of letters the effect of which was to inform Henry Edwards of the course and progress of the proceedings in the action brought by Phillips against Lord Huntingtower to recover the amount of the promissory note. Under the date of the 10th of February, 1842, there was in the same book a letter purporting to be written by Phillips to H. Edwards as follows: "Yourself *v.* Lord Huntingtower. The judgment against Lord Huntingtower has been completed, and nothing remains to be done but to put it in force when an opportunity presents itself. As you promised to return the 200*l.* in the middle of January if it was required, I now write to say that, having a large sum of money to invest on the 19th of this month, I shall be obliged by your remitting the same on or before that day."

Gibson deposed that he had caused search to be made amongst all the papers in his possession, as administrator of Phillips, but was unable to find the promissory note. He said that he believed the statements referred to by the other deponents to be true, and that he consented to the money due from the bankrupt's estate under the judgment being paid to J. N. Edwards, as executor of H. Edwards, to whom he believed that it properly belonged.

In the bankrupt's statement of his affairs made shortly after the commencement of the proceedings (which was verified by his oath, but ex parte and without cross-examination) there was an entry of a debt of 1500*l.* due to H. Edwards, of St. Alban's, to which was added, "This arises out of a debt incurred during minority, but since majority I have given bills. The amount I have received is about 200*l.* before majority, and 500*l.* since. The particulars of the bills I cannot give; some are before and some since majority."

The registrar admitted the proof for 2300*l.* 17*s.* 6*d.*

The official assignee in the bankruptcy and the creditors' assignees appealed.

Winslow, Q.C., and *Yate Lee*, for the appellants. The only evidence in support of the proof is the judgment. The Court of Bankruptcy can go behind a judgment, and it requires the

consideration for the debt to be proved: *Ex parte Bryant* (1); *Ex parte Maberley* (2); *Ex parte Kibble* (3); *Ex parte Marston.* (4)

[BAGGALLAY, L.J., referred to *Ex parte Banner* (5).]

Bigham, Q.C., and *Herbert Reed*, for the claimant. The onus is on the person who seeks to impeach a judgment. This appears from *Ex parte Bryant* (1) and all the other authorities. Some ground must be shewn for suspecting fraud or collusion in the obtaining of the judgment. Primâ facie a judgment is obtained adversely, and represents a real debt. In *Ex parte Maberley* (2) the proof was on a bill of exchange, and the creditor was only required to make an affidavit that he had given "full value" for it. The Court of Bankruptcy can no doubt inquire into a judgment, but the onus of proof is the same in that Court as in any other: *Ex parte Marston* (4); *Ex parte Mudie.* (6) In *Ex parte Banner* (5) there had clearly been a fraud. *Ex parte Ritso* (7) shews that a judgment imports consideration until it is impeached. The only thing adverse to the claimant is the delay in making the proof, but that is sufficiently explained by the fact that until recently there were no assets for distribution. A creditor is not bound to incur the expense of proving his debt where there is nothing to be got by doing so. The judgment fixed the amount due.

At any rate the proof ought to be allowed for the amount admitted by the bankrupt in his statement of affairs to be due to Edwards (the father). This is a statement which the bankrupt was bound to make, and it is admissible evidence as having been made by him in the discharge of his duty at the time. If he had been alive he must have been called and examined as a witness on the point, and would have been subject to cross-examination, but as he is dead, this written statement is evidence. It is an admission by the bankrupt against his interest. It is the interest of a bankrupt to make the amount of his debts appear as small as possible: *Price* v. *Earl of Torrington* (8).

(1) 1 V. & B. 211.
(2) 2 M. & A. 23.
(3) Law Rep. 10 Ch. 373.
(4) 3 M. & A. 444.
(5) 17 Ch. D. 480.
(6) 3 M. D. & De G. 66.
(7) 22 Ch. D. 529.
(8) 1 Salk. (6th Ed.) 285; 1 Sm. L. C. (8th Ed.) 344.

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Baggallay, L.J., after stating the facts and the evidence by which the claim was supported, continued:—The first observation which naturally occurs to one is, why was not this proof tendered forty-two years ago? It is said that the value of the bankrupt's assets was then so small, and the amount of his debts so large, that it was not worth while to incur the expense of establishing the claim to prove at that time; it would have been throwing good money after bad. The creditor chose to act upon that view of the case, and now, forty-two years afterwards, his legal personal representative comes forward to make this claim, which is founded on a judgment obtained in 1842, and is supported by evidence as to the information and belief of persons who could have known nothing of the original transaction. Having regard to the authorities I think a case has been shewn for inquiry into the consideration for the judgment debt. It is unnecessary to deal with the proposition of Mr. Winslow, that in every case the Court of Bankruptcy is entitled to inquire into the consideration for a judgment debt. The rule is clearly stated by Lord Justice James, in *Ex parte Kibble* (1), thus:—"It is the settled rule of the Court of Bankruptcy, on which we have always acted, that the Court of Bankruptcy can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relatives without any debt being due on them at all; it is therefore necessary that the consideration of the judgment should be liable to investigation." As at present advised, I do not wish to lay it down as a rule that the Court should inquire into the consideration for a judgment debt when nothing is shewn to justify the inquiry. I am disposed to think that primâ facie a judgment ought to be considered as binding. But, if a proper case is made, I think the Court ought to direct an inquiry into the consideration for a judgment debt. The judgment of Lord Justice James in *Ex parte Kibble* (2) appears to me consistent

(1) Law Rep. 10 Ch. 376. (2) Law Rep. 10 Ch. 373.

with all the previous cases. I think that if this proof had been tendered at the commencement of the bankruptcy proceedings, it would have been within the power of the commissioner, and it would have been his duty, to direct an inquiry into the consideration for the judgment debt. But no such investigation took place, because the creditor did not then think it worth his while to prove. The time has gone by, and I do not think any further evidence could now be obtained. In my opinion, upon the evidence as it stands, the proof ought not to be admitted.

COTTON, L.J. I am of the same opinion. The proof is founded simply on the judgment, for there is no evidence of any indebtedness by the bankrupt independently of the judgment. What is the law on the point? In bankruptcy a judgment certainly stands in a different position from that in which it previously stood as against the debtor himself, because the rights of the other creditors of the bankrupt have supervened. When a person is sui juris a judgment against him is very strong primâ facie evidence against him of the existence of a debt; if he disputes it, he must satisfy the Court that there is some reason which requires that the judgment should be set aside. It has been contended that in bankruptcy a judgment ought to be entirely disregarded, but it is unnecessary to decide that point now. I will deal with the case on the footing that the judgment cannot be disregarded, but that there may be other facts which entitle the Court to go behind it. What are the facts here? The judgment was obtained by Phillips in 1842, but he made no attempt to prove in the bankruptcy. The present claimant says that his father, having obtained this promissory note for 225*l.* from the bankrupt, handed it over to Phillips, who paid 20*l.* for it, and that he held the note as a mere trustee for Edwards. It is impossible to shut one's eyes to this, that the payment of the 20*l.* was not a real transaction, but that it was made to enable Phillips to say that he was a holder of the note for value. It shews that for some reason or other Edwards was unwilling himself to sue the bankrupt upon the note. In my opinion, if the proof had been put forward at the commencement of the bankruptcy it would have been the duty of the Court to make inquiry

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into the consideration for the judgment debt, and we ought not to deal with the matter on any other footing now. We ought not to put Edwards or his estate in any better position, because he has allowed the time to go by until those persons who could have told us the real facts of the case are dead.

It is said that the proof ought to be admitted for the 1500*l.* which is mentioned in the bankrupt's statement of affairs. I am of opinion that that statement, being made after the bankruptcy, is not such an admission against the interest of the bankrupt as is evidence against his creditors.

Lindley, L.J. I am of the same opinion. It is rather a startling thing to be asked to admit a proof of a debt forty-two years after the commencement of the bankruptcy, no one having heard anything of it until now. It is true the Statute of Limitations has not run. But, if we carry ourselves back to the year 1842, could the Court then have allowed Edwards, the father, to make this proof without any investigation into his claim? I think not. Looking at the circumstances, which throw a great deal of suspicion on the debt, it would not have been just to the other creditors to allow the proof without any investigation then, and I think it would be much less just now.

Appeal allowed.

Reed asked for leave to appeal to the House of Lords.

The Court refused to give leave.

Solicitor for appellants: *Still & Son.*
Solicitor for claimant: *M. T. Hodding.*

W. L. C.

[IN THE COURT OF APPEAL.]

1884
July 4.

EX PARTE REVELL. IN RE TOLLEMACHE. (No. 2.)

Bankruptcy—Act of Bankruptcy—Notice—Onus of Proof—Judgment recovered after act of Bankruptcy—Bankruptcy Act, 1849 (12 & 13 *Vict. c.* 106), *s.* 165.

When a creditor claims to prove in a bankruptcy in respect of a debt which came into existence after the commission of the act of bankruptcy on which the fiat was based (the bankruptcy being under the Bankruptcy Act, 1849), the onus is on him to prove that he had no notice of the act of bankruptcy before the creation of the debt.

Ex parte Schulte (Law Rep. 9 Ch. 409) followed.

THIS was an appeal from the admission of a proof against the estate of the Hon. William Lionel Felix Tollemache (commonly called Lord Huntingtower), against whom a fiat in bankruptcy was issued on the 2nd of September, 1842.

The act of bankruptcy on which the fiat was founded was that the debtor had lain in prison for more than twenty-one days for debt. He was arrested for debt on the 12th of July, 1842, and lodged in the Queen's Bench Prison, where he remained until the 2nd of September, 1842. Very few creditors proved in the bankruptcy at first, because the bankrupt had then practically no assets. He died on the 21st of December, 1872. His father, the Earl of Dysart, died in 1878; and thereupon some assets of considerable value became available for distribution among the creditors entitled to prove in the bankruptcy, and a number of proofs were tendered. A proof for £1516 8*s.* 3*d.* was tendered by H. B. Garling, who was the residuary legatee under the will of a Mrs. Madeley, who died on the 22nd of November, 1856. Mrs. Madeley was the residuary legatee under the will of R. S. Bassil, who died on the 3rd of March, 1849. Garling deposed that the bankrupt was in his lifetime indebted to Bassil in the sum of £1516 8*s.* 3*d.*, being the amount for which Bassil had recovered judgment against the bankrupt on the 9th of August, 1842. The judgment was produced. The personal representatives of Bassil joined in the

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proof. There was no other evidence of the debt than the judgment itself, and there was no evidence to shew that when the judgment was recovered Bassil had no notice of the act of bankruptcy. The official assignee and the creditors' assignees appealed.

Winslow, Q.C., and *Yate Lee*, for the appellants. The only evidence of the debt is the judgment, and the act of bankruptcy was complete on the 2nd of August, 1842, that is, before the judgment. The onus is on a person, whose claim arises after the commission of the act of bankruptcy to which the title of the assignee relates back, to shew that he had no notice of the act of bankruptcy: *Ex parte Schulte* (1); *Ex parte Vale.* (2) *Ex parte Schulte* was decided upon the construction of s. 95 of the Bankruptcy Act, 1869, but s. 47 of the Act 6 Geo. 4, c. 16, and s. 165 of the Bankruptcy Act, 1849, are substantially to the same effect. The respondent is bound to prove that the judgment was obtained by Bassil without knowledge of the act of bankruptcy.

Herbert Reed, for the claimant. The sections in question are enabling sections. Under the Act 46 Geo. 3, c. 135, s. 2, it was held that the onus of proving notice of an act of bankruptcy was on the person who alleged the act: *Robinson* v. *Vale.* (3)

[COTTON, L.J. The protecting sections establish an exception in favour of a person who has dealt with the bankrupt without notice of the act of bankruptcy; does it not follow that the onus must be on him to shew that he had no notice, in order to bring himself within the exception?]

In *Ex parte Schulte* (1) the claim was by an execution creditor to retain property which had become by relation back the property of the trustee in the bankruptcy, and the decision does not apply to a creditor who is seeking to prove in a bankruptcy.

BAGGALLAY, L.J., after stating the facts, and referring to s. 165 of the Bankruptcy Act of 1849, continued:—That section was in substance a repetition of s. 47 of the Act 6 Geo. 4, c. 16,

(1) Law Rep. 9 Ch. 409. (2) 18 Ch. D. 137.
(3) 2 B. & C. 762.

which again was a repetition of s. 2 of the Act 46 Geo. 3, c. 135. Assuming, therefore, everything else in favour of the claimant's right to prove, the question is whether Bassil, at the time when he obtained his judgment, had notice of the prior act of bankruptcy on which the adjudication was founded? I am clearly of opinion that in a case of this kind, when a person is claiming the benefit of the protection given by the Act, the onus is on him to shew that he had no notice of the prior act of bankruptcy. *Ex parte Schulte* (1) is a direct decision that under s. 95 of the Bankruptcy Act, 1869, the onus was on an execution creditor to prove that he had no notice of a prior act of bankruptcy, and I think the principle of that decision equally applies to the present case. I can quite understand the difficulty there is in proving this absence of notice after a lapse of forty years; but that arises from the delay in taking steps to establish the claim. No blame attaches to the original creditor for not coming forward to prove in the first instance; it was not worth his while to throw good money after bad. But, if he had attempted to establish this claim, he would have been bound to prove that he had no notice of the act of bankruptcy committed prior to the date of his judgment. The proof must be rejected.

COTTON, L.J. I am of the same opinion. The proof is on a judgment of which we do not know whether it was founded on tort or on contract. I agree with Lord Justice Baggallay that the claimant is coming forward to prove under the provisions of an enabling section, and that, consequently, it is for him to bring himself within the protection or benefit conferred by the section. On the mere words of the section I am of opinion that the person who claims the benefit must assume the burden of proving the facts which entitle him to it. At any rate, he must give some primâ facie evidence of them. This view is, no doubt, supported by *Ex parte Schulte* (1), which was decided under the Bankruptcy Act, 1869. It is said that that case is distinguishable from the present, because there the claim was to property which would otherwise have vested in the trustee by reason of the relation

(1) Law Rep. 9 Ch. 409.

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Ex parte Revell In re Tollemache. (No. 2.)

back of his title to the act of bankruptcy. I am of opinion that there is no real distinction between the two cases. The claimant is seeking to compete with the other creditors for a share of the assets; the trustee claims the assets for the purpose of distribution among all the creditors. The claimant is seeking to lessen the dividend payable to the other creditors, and he stands for the present purpose in exactly the same position as an execution creditor who is seeking to diminish the assets available for distribution among the creditors. In my opinion there is no distinction between the two cases. But I rest my decision on the construction of s. 165 of the Act of 1849. It is said that the judgment is primâ facie evidence of a previously existing debt, but there is nothing to shew that the judgment was obtained in respect of a debt at all.

Lindley, L.J. I am of the same opinion. In order to avail himself of this exceptional privilege the claimant must comply with the statutory requirement, i.e., he must prove that the judgment creditor had, at the date of the judgment, no notice of the prior act of bankruptcy. This he cannot do.

Appeal allowed.

Solicitors for appellants: *Still & Son.*
Solicitors for claimant: *Iliffe, Russell & Co.*

W. L. C.

[IN THE COURT OF APPEAL.]

1884
July 11.

EX PARTE GOOD. IN RE SALKELD.

Bankruptcy—Leasehold Interest of Bankrupt—Disclaimer by Trustee—Leave of Court—Conditions imposed—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules*, 1871, *r.* 28.

A lease of land and minerals was granted to two partners in trade as joint tenants. The partnership was afterwards dissolved, on the terms that the business should be carried on by one of the partners alone, and that he should purchase the interest of the other for 12,000*l.*, which was to be paid in forty equal half-yearly instalments. The retiring partner covenanted that he would stand possessed of his share and interest in the demised premises in trust for the continuing partner. The continuing partner covenanted with the retiring partner to pay the 12,000*l.* in the manner agreed upon, and assigned to him the buildings, machinery, and fixtures on the demised premises by way of mortgage to secure the payment of the 12,000*l.*, and covenanted that the leasehold premises should stand charged therewith. A year afterwards the continuing partner filed a liquidation petition, under which a trustee of his property was appointed. The trustee occupied the demised property for some time with a view to the benefit of the debtor's estate. The rent due under the lease was paid to the landlord by the retired partner:—

Held, that leave to disclaim the debtor's interest in the lease ought to be given to the trustee only on condition of his paying to the retired partner the rent of the premises from the date of the trustee's appointment until the day when his beneficial occupation thereof ceased.

THIS was an appeal from an order made by Mr. Registrar Pepys on the 11th of March, 1884, giving leave to the trustee in the liquidation of John Salkeld to disclaim a leasehold interest of the debtor, conditionally on his payment of certain rent.

John Thomlinson and John Salkeld carried on in partnership the business of cement manufacturers, and on the 1st of January, 1875, Earl Ferrers granted to them as joint tenants a lease for a term of twenty-one years of certain lands and beds of plaster and earth, subject to the payment of a dead rent and certain royalties, and to the observance and performance of the covenants and conditions in the lease contained.

On the 20th of March, 1882, Thomlinson and Salkeld dissolved partnership as from the 31st of December, 1881, on the terms that the business should be carried on by Salkeld alone, and that he

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should purchase Thomlinson's interest for the sum of 12,000*l.*, to be paid in forty equal half-yearly instalments. And by the deed of dissolution Thomlinson covenanted that he would, as from the 31st of December, 1881, stand possessed of his share and interest in the premises comprised in the lease until the term should be determined or surrendered as thereinafter mentioned, in trust for Salkeld. It was also agreed that Thomlinson should forthwith, at the request of Salkeld, join with him in applying to the lessor to accept a surrender of the lease, and in executing a surrender, and in applying to the lessor for a grant of a new lease to Salkeld, and that, when such new lease was granted, Salkeld would, if he could obtain a license from the lessor, demise or assign the new lease to Thomlinson by way of mortgage to secure the payment of the 12,000*l.*

By another deed executed the same day Salkeld covenanted with Thomlinson for the payment of the 12,000*l.* in the manner agreed upon, and also assigned to Thomlinson the buildings, engines, machinery, and fixtures on the leasehold premises, by way of mortgage to secure the payment of the 12,000*l.*

Salkeld also thereby covenanted with Thomlinson that the premises comprised in the lease should, until a surrender of the lease, and that, after the grant of a new lease, the premises comprised in such new lease should, until the execution of a mortgage thereof to Thomlinson, stand charged with the payment to Thomlinson of the 12,000*l.*

This deed was not registered as a bill of sale.

On the 18th of June, 1883, Salkeld filed a liquidation petition, under which, on the 18th of July, 1883, a trustee of his property was appointed.

No surrender of the lease of the 1st of January, 1875, had been made.

On the 18th of July, 1883, the trustee entered into an agreement with a son of Salkeld that he should keep the ovens and machinery on the leasehold premises in work, paying the trustee £4 a month by way of rent for the use of the same, the tenancy to be subject to one month's notice in writing on either side.

At the date of the filing of the liquidation petition there was an arrear of rent due to Earl Ferrers, and Thomlinson was

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compelled to pay this rent, and also some further rent which afterwards accrued due.

On the 11th of January, 1884, the trustee applied to the Court for leave to disclaim the debtor's interest in the lease, and notice of this application was served on Earl Ferrers and on Thomlinson. Thomlinson had proved in the liquidation in respect of the 12,000*l.*

The Registrar granted leave to disclaim, upon the terms of the trustee paying to Thomlinson the rent of the premises as and from the 18th of July, 1883 (the date of the trustee's appointment), until the day when his beneficial occupation thereof had ceased.

The trustee appealed.

R. Vaughan Williams, for the appellant. Unconditional leave to disclaim ought to have been given. Thomlinson has no interest in the lease; he has sold his interest to Salkeld.

[COTTON, L.J. He is bound to pay the rent to Lord Ferrers. The question is whether, as between the trustee and Thomlinson, the trustee ought not to bear the burden.]

Thomlinson ought to bear it. He is entitled to prove in the liquidation for the 12,000*l.*, and this right is equivalent to payment. He can also prove on the covenant for indemnity. This is his only remedy. The rule as to imposing conditions on a trustee in bankruptcy when leave is given to him to disclaim a lease is laid down in *Ex parte Isherwood.* (1) One of the reasons pointed out there by Cotton, L.J. (at p. 395), for requiring the trustee to compensate the landlord does not exist in the present case.

[COTTON, L.J. The trustee's occupation was with a view to the benefit of the debtor's estate. Why should not the debtor's joint tenant be placed in the same position as if there had been no liquidation?]

The relation back of the disclaimer to the date of the trustee's appointment does not deprive Thomlinson of any right which he would otherwise have had against the debtor; his rights arise, not under the lease, but under the deed of dissolution of partnership.

(1) 22 Ch. D. 384.

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[COTTON, L.J. But for the disclaimer the trustee would be liable to the landlord, and that would have relieved Thomlinson.

LINDLEY, L.J. Thomlinson, as trustee of the lease for Salkeld, would have been entitled to an indemnity from his cestui que trust against his liabilities under it, and would have had a lien on the lease.

BAGGALLAY, L.J., referred to *Ex parte Arnal* (1).

COTTON, L.J. A right to indemnity arises (independently of any contract) when the legal estate is in one person and the beneficial interest in another.]

Thomlinson's only remedy is his right of proof for breach of contract. If Salkeld had sold his interest in the lease his purchaser would have obtained a good title, but this would not have deprived Thomlinson of his right to an indemnity from Salkeld. The nature of Thomlinson's right cannot depend upon the accident whether Salkeld has or has not sold his interest. The trustee, it is true, has kept Thomlinson out of possession of the property, but not by virtue of the lease which he seeks to disclaim. Thomlinson was kept out of possession by virtue of a different contract. In all the previous cases the person who was to be compensated had been kept out of possession by virtue of the lease which was to be disclaimed.

[BAGGALLAY, L.J. Thomlinson has paid that rent which, but for the liquidation, Salkeld would have had to pay.]

He has a remedy by proof: why should he get 20*s.* in the pound?

[BAGGALLAY, L.J. He would have been entitled to prove, even if the trustee had had no beneficial occupation of the property.]

Ex parte Isherwood (2) was approved in *Ex parte Arnal* (1). The arrangement which the trustee made with the debtor's son for the protection of the mortgaged property was in the interest of the estate; the more that property realized the less would be the amount of Thomlinson's proof. The order is a great hardship on the trustee.

[COTTON, L.J. He is not ordered to pay out of his own pocket.]

(1) 24 Ch. D. 26. (2) 22 Ch. D. 384.

Doubts have been expressed by some judges whether rule 28 of the Bankruptcy Rules, 1871, which requires the trustee to obtain the leave of the Court before disclaiming a lease, was not ultra vires.

F. Cooper Willis, for Thomlinson, was not heard.

Baggallay, L.J., after stating the facts, continued :—Possibly the Registrar's order may mean that the trustee is personally to pay the rent. But it is not an order that he do pay the money; it is only an order giving him leave to disclaim on condition of his paying it. The substantial question is, whether Thomlinson should be allowed to receive this particular amount of rent in full, he having paid it to the landlord, or whether he is only entitled to a dividend upon it by virtue of the contract of the 20th March, 1882. It is said that this condition ought not to be imposed on the trustee, because he has not had any beneficial occupation of the property. It has been clearly established by a series of cases, *Ex parte Ladbury* (1), *Ex parte Isherwood* (2), *Ex parte Izard* (3), and *Ex parte Arnal* (4), that, in determining whether, on giving leave to a trustee to disclaim a lease belonging to a bankrupt, he shall be required to pay compensation to the landlord, the Court will have regard, not merely to the actual benefit which has resulted to the estate from the trustee's occupation, but to the question whether the possession was retained by him with the view of obtaining a profit for the estate. In the present case a lease was granted by the trustee of the ovens and machinery on the property to the debtor's son at an almost nominal rent, the object being that the machinery should be kept in proper order until an opportunity should arise of disposing of it for the benefit of the estate. I have no doubt that the possession of the property was retained by the trustee with the view of obtaining a benefit for the estate, and, therefore, the case is one in which the trustee would have been required to pay compensation to the landlord. If the landlord had not been paid the rent, the rule would have applied that leave to disclaim the lease ought to be given only on the

(1) 17 Ch. D. 532.
(2) 22 Ch. D. 384.
(3) 23 Ch. D. 115.
(4) 24 Ch. D. 26.

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terms of the trustee's making compensation to the landlord. The Registrar thought it right to have the co-lessee as well as the landlord before him, and it seems to me that he was fully justified in requiring the trustee to pay to Thomlinson that compensation which, if he had not paid the rent to the landlord, the trustee would have been required to pay to the landlord. If this condition was not imposed, the trustee would have had the beneficial occupation of the property without paying anything for it. The principle which applies to the case of a landlord appears to me to apply equally to the case of a person who has actually paid the rent to the landlord. This I think is sufficient to dispose of the case, and to shew that the Registrar's conclusion was right in principle. This Court will not interfere with the amount of compensation fixed by him, unless it can see that he has assessed it on a wrong principle.

Cotton, L.J. I think the Registrar's order is right. Of course this case is different in its circumstances from previous cases. But certain rules have been laid down by those cases. The first question is, whether the trustee's occupation of the leasehold premises has either been beneficial to the bankrupt's estate, or was contemplated as likely to be beneficial to it? If so, the cases shew that compensation ought to be required to be given to the landlord, as a condition of allowing a disclaimer of the lease, because, inasmuch as by virtue of the disclaimer the lease would be put an end to as at the date of the trustee's appointment, the landlord would have no other remedy. In the present case the trustee's occupation was clearly intended for the benefit of the debtor's estate; the object was to keep the machinery and other chattels in such a condition that they should realize as much as possible for the estate. The next question is, whether it is right to require the trustee to make compensation for that beneficial occupation, not to the landlord, but to Thomlinson. Thomlinson's position was this—he was legally liable to pay the whole rent to the landlord, but he had no beneficial interest in the property. He was a trustee of his interest in the lease for the debtor. If the landlord had not been paid his rent, it would, according to the previous decisions, have been right to require the trustee to

pay compensation to him in respect of his beneficial occupation. Thomlinson, by virtue of his position as a trustee, and independently of any express contract, is entitled to be indemnified by his cestui que trust against his legal liability under the lease, and has for that purpose a lien on the interest of his cestui que trust in the lease, and, when the trustee in the liquidation comes to the Court and asks that he may be allowed to put an end to that interest as from an antecedent period, I think the Registrar was right in allowing this only on the terms of his paying compensation to Thomlinson, who by the disclaimer would be deprived of the lien which he would otherwise have had.

LINDLEY, L.J. I have arrived at the same conclusion. I do not regard the case as a simple one of landlord and tenant. Thomlinson stood in a peculiar position. He was a joint lessee with Salkeld, and he afterwards became a trustee of his own interest in the lease for Salkeld. The trustee in the liquidation when he was in possession of the property was Thomlinson's cestui que trust. Thomlinson was liable to the landlord, and he had a lien on the beneficial interest of his cestui que trust for his indemnity. He was in fact a secured creditor, and, when the property on which he had a security is taken away, I think he should be treated as if he had that lien still. No doubt he had a right to prove in the liquidation, but he was also a secured creditor.

Appeal dismissed. (1)

Solicitors for appellant: *Surr, Gribble, & Co.*
Solicitors for respondent: *Ullithorne, Currey, & Villiers.*

(1) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55.

W. L. C.

1884
Aug. 13.

IN RE MOSER.

Bankruptcy—Leaseholds—Fixtures—Disclaimer—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55.

Where there are trade fixtures on the leasehold premises of a bankrupt, removable by the tenant, and the trustee applies for leave to disclaim the lease, the same rule will be applied as between the landlord and trustee as would obtain if the lease had been determined in an ordinary way. Therefore the landlord must either take over the fixtures at a valuation or the trustee must have a reasonable time, before disclaiming, in which to sever and remove them.

ON the 28th of May, 1884, W. E. Moser, who was carrying on business as a basket manufacturer at 20, Red Lion Square, filed his petition in bankruptcy, and the same day a receiving order was made.

The official receiver carried on the business with the concurrence of the creditors and with the assistance of the debtor, until the 25th of July, when the trustee, who had been appointed on the 14th of July, took the business over.

The business premises were leasehold, and were held under several deeds at an aggregate rental of 270*l.* per annum. The official receiver had paid the quarter's rent due at Midsummer.

The trustee now applied for leave to disclaim the leases. There were trade fixtures and fittings upon the business premises, removable by the tenant, of the estimated value of 85*l.*, but which would not be worth more than 40*l.* if severed.

H. Reed, for the motion. Under the Bankruptcy Act, 1869, fixtures became, on disclaimer of the trustee, the property of the landlord, but under s. 55 of the present Act the Court has now a discretion in the matter. It is admitted that the landlord is entitled to some compensation, and probably the measure of compensation would be the rent accruing from the last quarter down to the date of the disclaimer, and the trustee is ready to disclaim to-day. But the landlord should either take over the fixtures at

a valuation to be set off against the rent, or allow the trustee a reasonable time in which to remove the fixtures.

Mr. *Hanrott* (solicitor), for the landlord.

WILLS, J. I think the principles applicable to fixtures on the determination of a tenancy under ordinary circumstances should be applied when a lease is determined by the disclaimer of a trustee in bankruptcy. There will be leave to disclaim. The landlord is entitled to some compensation, and must be paid the rent accruing from the last quarter, down to the day on which the lease is disclaimed. He must, however, give the trustee an opportunity of removing the fixtures or take them over at a valuation. It will be better to fix a time, and in this case the order will be that the landlord have two days in which to decide whether he will take to the fixtures, in which case their value will be a set-off against the rent; if he declines the fixtures, then the trustee must have two days in which to remove them.

Ordered accordingly.

Solicitors for trustee: *Lindsay, Mason, & Co.*
Solicitor for landlord: *Hanrott.*

H. L. F.

1884
July 18.

[IN THE COURT OF APPEAL.]

IN RE BROAD. EX PARTE NECK.

Bankruptcy—Bill of Exchange—Acceptances for Accommodation of Drawer—Remittances to cover Acceptances—Insolvency of Acceptor—Specific Appropriation—Interest credited by Acceptor to Drawer.

A banker in London was in the habit of accepting for the accommodation of a customer, a merchant in Sweden, bills drawn on him by the merchant, who used to remit other bills to the banker to put him in funds to meet the acceptances when they became due. The banker, with the knowledge of the customer, generally discounted the remitted bills before they fell due, and paid the proceeds to his current account with his own bankers. He rendered yearly accounts to the customer, and in those accounts he credited him with interest on the amounts of the remitted bills from their due dates, and debited him with interest on the amounts which he paid in discharge of the acceptances. The amounts of the bills remitted by the customer did not always exactly correspond with the amounts of the acceptances which they were intended to cover. In April, 1883, the banker accepted a bill for 450*l.* drawn on him by the customer, and maturing on the 21st of July. On the 13th of July the customer sent to the banker a bill for 450*l.* upon W., of London, payable at sight. This bill was received by the banker on the 17th of July, and the proceeds were paid to his bankers and carried to his current account. On the 20th of July the banker stopped payment. His acceptance for 450*l.* was dishonoured the next day, and the customer had to pay it. In November, 1883, the banker filed a liquidation petition:—

Held, that the remitted bill for 450*l.* was not specifically appropriated to meet the banker's acceptance for 450*l.*, and that, as the amount of the bill had been received by the banker before the commencement of the liquidation, the customer was not entitled to the proceeds in specie, but could only prove for the amount as a debt in the liquidation.

Semble, that, if the remitted bill had remained in specie at the commencement of the liquidation, the customer would, on retiring the acceptance, have been entitled to have the bill returned to him.

In re Gothenburg Commercial Co. (29 W. R. 358) approved and followed.

THIS was an appeal from an order made by Mr. Registrar Hazlitt on the 24th of April, 1884, directing the trustee in the liquidation of J. F. Neck to pay J. Thomsen, of Bergen, in Sweden, out of the assets of the debtor, the sum of 450*l.*, being the amount of a draft drawn by Thomsen on Westenholz Brothers, of London, dated the 13th of July, 1883, payable at sight, and which was remitted by Thomsen to Neck for the purpose of taking up a bill of exchange drawn by Thomsen on Neck, dated the 19th of April, 1883, and accepted by Neck.

Neck had carried on the business of a foreign banker and merchant in the city of London. Thomsen carried on business at Bergen, in Sweden, as a merchant, under the firm of Gottlieb Thomsen. For some years Neck had been in the habit of accepting for the accommodation of Thomsen bills drawn on him by Thomsen. The course of business was thus described in an affidavit made by Thomsen: "For some years past I have been accustomed from time to time to draw bills upon Neck at three months date, which he has accepted, and before the due dates of such bills it has been my invariable custom to remit funds to Neck to cover my drafts as they respectively matured." Thomsen further said: "On the 19th of April, 1883, I drew a bill for 450*l.* on Neck, payable to the order of Bergen's Private Bank, at three months date, which bill was accepted by Neck and was made payable at his bankers in the city of London. The said bill matured on the 21st of July, 1883 (the 22nd of that month falling on a Sunday). On the 13th of July, 1883, I remitted to Neck a draft for 450*l.*, upon Westenholz Brothers of London, at sight, which I am informed and believe was received by Neck on the 17th of July, 1883. I am also informed and believe that the draft upon Westenholz Brothers was accepted by that firm, and was paid by Neck to his account with his bankers on the day it was received, and that it was duly collected."

On the 20th of July, 1883, Neck stopped payment, and, when the bill for 450*l.* which he had accepted was presented the next day to his bankers for payment, payment was refused.

Neck made an affidavit in which he said: "Thomsen was well aware from time to time, when he remitted to me bills to meet my acceptances on his account and for his accommodation, that I was in the habit of discounting such bills remitted by him, although, as a matter of fact, I sometimes did not discount such bills forthwith, but retained the same until it was convenient to me to discount them. In any event it was the arrangement between us that I should debit him with interest at the rate of 5 per cent. per annum in respect of moneys paid by me for the purpose of paying my credit acceptances as aforesaid, and credit him with interest at the same rate, from the due dates of any remitted bills, in respect of any moneys which were the proceeds of bills remitted

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EX PARTE BROAD. IN RE NECK.

by him. It was my custom to render accounts to Thomsen annually, and such accounts were made up to the 31st of December in each year, and the balance of interest was either debited or credited, as the case might be, in the accounts so rendered."

Neck's books shewed that the accounts between himself and Thomsen were kept in the manner thus described.

The letter, dated the 13th of July, 1883, in which Thomsen sent to Neck the bill for 450*l.* on Westenholz Brothers, contained the following passage: "Inclosed I beg to remit 450*l.* at sight on Westenholz Brothers, which please encash to my credit." In a letter, dated the 18th of July, 1883, written by Neck to Thomsen, he said: "We are in receipt of your favour of the 13th inst. handing a cheque for 450*l.* for 17th inst. on Westenholz Brothers, which is noted to the credit of your account. In the book of "bills receivable" kept by Neck, the bill on Westenholz Brothers was entered as received on Thomsen's account. On the 14th of November, 1883, Neck filed a liquidation petition, under which his creditors resolved on a liquidation by arrangement and appointed a trustee.

The trustee appealed from the Registrar's order.

Sidney Woolf, for the appellant. No doubt the bill for 450*l.* on Westenholz was sent by Thomsen to Neck for the purpose of meeting his own bill, which matured on the 21st of July. But there was no fiduciary relation between Thomsen and Neck such as there was in *In re Hallett* (1), and Thomsen is not entitled to follow the proceeds of the remitted bill. He would have been entitled to the bill if it had remained in specie, but the arrangement that interest should be paid by Neck shews that it was intended that he should be at liberty to use the proceeds of bills which he received in his business as a banker does, and that consequently those proceeds were not specifically appropriated to meet Neck's acceptances for Thomsen. *In re Gothenburg Commercial Company* (2) is a distinct authority to that effect.

[BAGGALLAY, L.J., referred to *Johnson* v. *Robarts* (3).]

It is an ordinary case of banker and customer; Neck had the right to use the money as his own, and it has become the property of the trustee. Thomsen has only a right of proof.

(1) 13 Ch. D. 696. (2) 29 W. R. 358. (3) Law Rep. 10 Ch. 505.

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J. E. Linklater, for Thomsen. It is admitted that, if the bill on Westenholz had remained in specie, Thomsen would have had a right to have it back again; this shews that there was a fiduciary relation. In other words, the remitted bills were sent by Thomsen for the purpose of meeting Neck's acceptances for him. The payment of interest is the only thing adverse to Thomsen's claim. But interest was allowed only from the due dates of the remitted bills, not from the dates when they were discounted; and, not down to the time of the payment of the bills which the remitted bills were intended to cover, but down to the end of the year. Neck was aware that the bill on Westenholz was sent expressly to meet his own acceptance for 450*l.* *In re Hallett* (1) applies. The sending of remittances generally for the purposes of a specified account is a sufficient appropriation: *Ex parte Gomez* (2). Unless the banker is authorized to deal with the customer's remittances as if they were absolutely his own moneys, the customer is entitled, in the event of the banker's bankruptcy, to have the sums remitted returned to him in specie: *Ex parte Cooke.* (3) In *In re Gothenburg Commercial Company* (4) there was a distinct agreement that the proceeds of the remittances should be employed by the person to whom they were sent for his own purposes.

[COTTON, L.J. It was only an agreement implied from the course of dealing.]

BAGGALLAY, L.J. The question whether the bill for 450*l.*, which was remitted by Thomsen to Neck on the 13th of July, was specifically appropriated to the taking up of a bill for the same amount which had been accepted by Thomsen for Neck, and which fell due upon the 21st of the same month, depends, I think, partly upon the general course of dealing between Thomsen and Neck, and partly upon the circumstances attending the particular remittance which was made on the 13th of July. Now the ordinary course of dealing appears to have been this:—Neck was from time to time under liabilities upon acceptances on behalf of Thomsen, and the practice was that Thomsen should

(1) 13 Ch. D. 696.
(2) Law Rep. 10 Ch. 639.
(3) 4 Ch. D. 123.
(4) 29 W. R. 358.

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remit moneys or bills for the purpose of enabling Neck to meet the acceptances when they became due. That appears to have been the general course of dealing. Possibly in some cases the remitted bills were retained by Neck until they became due, but, occasionally, at any rate, he cashed them before they became due, and he carried the amount of the cash, whether obtained by discount or otherwise, at once to the general credit of Thomsen's account. The particular remittance of the 13th of July was a bill payable "at sight," and that bill was cashed by Neck on the 17th of July, and the amount was carried to the general credit of the account. This appears to have been in accordance with the ordinary course of the dealing, and, if this particular transaction was not in any way taken out of the ordinary course of the dealing, it would follow that the Registrar's decision was wrong, and that Thomsen is not entitled to have the proceeds of the 450*l.* bill specifically paid over to him. But it is suggested that there was a specific appropriation so far as regards this particular transaction, and reliance has been placed on Thomsen's letter of the 13th of July, which was sent to Neck with the bill for 450*l.* But the terms of that letter seem to me to be entirely in accordance with the usual practice. No doubt the general ground or reason why the remittance was made was, that bills drawn by Thomsen on Neck were becoming due (there were other bills payable on the 21st of July), but an authority to "encash" the remitted bill, and to carry the amount to Thomsen's credit, is contained in this very letter. If this bill had not been cashed before Neck's stoppage on the 20th of July, but had remained in specie, then, upon the authority of *Ex parte Gomez* (1) and *In re Gothenburg Commercial Company* (2), Thomsen would be entitled to have the proceeds paid to him. It appears to me that *In re Gothenburg Commercial Company* (2) distinctly applies to the present case, when once it is ascertained that in the ordinary course of business the remitted bill has been cashed, and the proceeds carried to the general credit of the account, and interest credited on them. In that case it was strongly urged that there was a specific appropriation, because the letter written by the manager of the Swedish Bank, only three days before the stoppage of the company, referred to the

(1) Law Rep. 10 Ch. 639. (2) 29 W. R. 358.

remittances as being made specially as provision for paying certain acceptances which were about to become due. However, it was held that, as regards those remittances which were cashed before the stoppage, and the proceeds paid to the general credit of the account, there was no right on the part of the remitters to the proceeds, but that, as regards those remittances which had not been cashed before the stoppage, the remitters were entitled to have them specifically appropriated.

I think that when once you ascertain the relation, and the nature of the course of dealings, between the parties in the present case, the decision in *In re Gothenburg Commercial Company* (2) is applicable, and that this appeal must be allowed.

COTTON, L.J. I also am of opinion that the appeal must be allowed. We have to deal with the proceeds of a remittance made by the customer to the debtor which had been cashed before the debtor's stoppage, not with a bill which remained in specie at the time when the stoppage took place. If the bill had remained in specie, the matter would have stood upon a very different footing, and, though it is not necessary to decide the point, probably the customer might then have been entitled to say, "That is my bill; I have paid your acceptance, therefore hand over the bill to me." But what really took place was this. A few days before the stoppage the debtor cashed the bill, and now the customer says, "I am entitled to follow the proceeds, as trust-money specifically appropriated to a purpose which has not been performed, and therefore the money ought to be handed over to me." In my opinion he is not so entitled. We find that the course of dealing was this. Although the remittances were made by the customer for the purpose of meeting the debtor's acceptances on his account, yet the debtor cashed or discounted the remittances which were made to him, and carried the proceeds to the general account of the customer, and credited the customer with interest on the sums which he had thus received in respect of the remittances.

Now in *In re Gothenburg Commercial Co.* (1), Sir G. Jessel, M.R., said (2), "The bills were sent, I think, originally for the purpose generally of providing funds to meet the acceptances,

(1) 29 W. R. 358. (2) At p. 360.

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and for no other purpose, with this right of discounting and appropriating the money." If a man pays interest for money he must be entitled to the use of it. When a man locks up money which is intrusted to him in a box, he does not pay interest on it. I think we must judge of the contract between the parties from the course of dealing and from the accounts which were rendered, and, looking at the whole course of dealing, in my opinion, although, so long as the remittance remained in specie, the customer might have said, "Hand it over to me," yet, looking at the accounts rendered from time to time, the inference is, that the banker was to be at liberty to put himself in funds by cashing the remittances, and, when he had done so, to treat himself, not as a trustee of the proceeds for the customer, but only as a debtor to the customer for the sum which he had thus received. In my opinion, interest being from time to time carried to the credit of the customer in the account, the banker was entitled to put the proceeds into his own pocket, not keeping them separate from his general account.

In my opinion, therefore, as regards the proceeds of this bill which was cashed before the stoppage, the customer must come in and prove as a creditor, and I cannot say that the debtor was a trustee of the money for him. I cannot see any distinction between the present case and *In re Gothenburg Commercial Co.* (1)

LINDLEY, L.J. I am of the same opinion. When we look at the course of dealing between the parties, and the terms of the letter of the 13th of July, which remitted the bill for 450*l.* at sight, and also at what was done with respect to interest on the balance due on the account between the parties, I think the inference is inevitable that the position of Neck, as regards the money received by him from the bill, was not that of a trustee, but that of a debtor. I am quite unable to distinguish this case from *In re Gothenburg Commercial Co.* (1)

Appeal allowed.

Solicitor for trustee: *H. Montagu.*

Solicitor for Thomsen: *Young, Jones, & Co.*

(1) 29 W. R. 358.

W. L. C.

[IN THE COURT OF APPEAL.]

1884
Aug. 4.

EX PARTE EDWARDS. IN RE CHAPMAN.

Bankruptcy—Act of Bankruptcy—Relation back of Trustee's Title—Bankruptcy Petition—Money received by petitioning Creditor's Solicitor from Debtor during Pendency of Petition, and paid over to petitioning Creditor—Liability of Solicitor to refund to Trustee—Principal and Agent.

Pending the hearing of a bankruptcy petition, and with notice of the act of bankruptcy on which it was founded, the solicitor of the petitioning creditor, as his agent, received from the debtor various sums of money as consideration for successive adjournments of the hearing of the petition, and these sums he paid over, or accounted for, to his client (the petitioning creditor). Afterwards an adjudication was made on the petition:—

Held, that, the solicitor having received the money with notice of the act of bankruptcy to which the title of the trustee related back, the payment by him was a wrongful act, and he was liable to repay the money to the trustee, and was not discharged by the payment to his own principal.

THIS was an appeal from a decision of Mr. Registrar Murray.

On the 20th of February, 1883, John Storey presented a bankruptcy petition against James Chapman, alleging that Chapman was indebted to him in the sum of 492*l.* The act of bankruptcy on which the petition was founded was the failure of Chapman to comply with a debtor's summons which Storey had previously served on him for the 492*l.* Mr. Thomas Edwards acted as solicitor for Storey in the matter of the summons, and also in the matter of the petition. The petition was appointed to be heard on the 5th of March, when by consent the hearing was adjourned to the 10th of April, Chapman paying 100*l.* as a consideration for the postponement. This sum was paid to Edwards on behalf of Storey. Three subsequent adjournments were consented to on similar terms, Chapman paying on those occasions respectively 130*l.*, 50*l.*, and 25*l.* These three sums were also received by Edwards as agent for Storey. Ultimately the petition was heard on the 24th of October, when Chapman was adjudicated a bankrupt. Edwards rendered a cash account to Storey from January, 1883, up to the 3rd of August, in which he credited him with 305*l.*, the amount of the four sums received

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by him from Chapman, and debited him with 150*l.* cash paid to him on the 30th of April, and also with various sums for costs, the account shewing a balance of 190*l.* due from Storey.

The trustee in the bankruptcy applied to the Court for an order that Edwards should pay the 305*l.* to him, on the ground that he had received it with notice of the act of bankruptcy. The Registrar made the order.

Edwards appealed.

A. à Beckett Terrell, and *Wyatt Hart*, for the appellant. No doubt Storey is liable to pay the 305*l.* to the trustee, but under the circumstances Edwards is not liable. He was clearly authorized to receive the money on behalf of his principal, Storey, and when he had received it he was bound to hand it over to his principal. The authority of the principal protects the agent. There is no suggestion of any fraud or other improper conduct. The trustee's application is in the nature of an action for money had and received to his use. In *Stephens* v. *Badcock* (1) it was held that the clerk of an attorney who, in the absence of the attorney, had received money for a client, which the client had authorized the attorney to receive for him, could not be sued by the client for the money, though the attorney was bankrupt and the clerk had not paid over the money to him or his estate. In law the money came to the hands of Storey, the principal, not to the hands of Edwards, the agent. In *Stead* v. *Thornton* (2), before the money was received by the agent, the agency had been revoked by the lunacy of the principal. *Vernon* v. *Hankey* (3) is distinguishable.

[COTTON, L.J. The question is whether, so long as the petition was pending, Edwards could properly hand over the money to Storey, seeing that, if an adjudication was made, the money would belong not to him, but to the trustee?]

If that is the right view, Edwards would have been entitled to hold the money for twelve months. In the absence of fraud or tort of any kind an agent is protected by the authority of his

(1) 3 B. & Ad. 354. (2) 3 B. & Ad. 357.
(3) 2 T. R. 113.

principal: *Cranch* v. *White* (1); *Perkins* v. *Smith* (2). In *Attorney-General* v. *Earl of Chesterfield* (3) it was held that an agent by whom the affairs of a charity had been managed on behalf of a trustee was not a proper party to an information against the trustee for an account, on the ground that an agent is accountable only to his principal. *Maw* v. *Pearson* (4) and *Barnes* v. *Addy* (5) are to the same effect. *Hollins* v. *Fowler* (6) may be relied on for the trustee, but that case is distinguishable. In the present case, until a demand for the money was made by a duly appointed trustee in the bankruptcy, the agent's possession was lawful, and he was justified in handing, indeed he was bound to hand, the money to his own principal. The Registrar relied on *Ex parte Helder* (7), but there the question was whether the act of bankruptcy was complete at the time when the agent handed over the money, and the Court held that it was not. That decision does not affect the present case. Storey could have dismissed his petition, and no other creditor could have availed himself of the particular act of bankruptcy: Bankruptcy Act, 1869, s. 6, sub-s. 6. Storey could have maintained an action against Edwards for the money. In *Ex parte Jay* (8) a receiver had been appointed. *Ex parte Hankin* (9) does not apply.

[LINDLEY, L.J., referred to *Sharland* v. *Mildon* (10), in which it was held that an agent of an executrix de son tort was liable to be sued as executor de son tort for moneys belonging to the testator's estate, which he had received on behalf of his own principal and handed over to her, believing her to be the rightful owner, on the ground that he and his principal were both wrong-doers.]

The executrix de son tort had no title at all. In bankruptcy, until an adjudication is made and a trustee appointed, there is no true owner of the bankrupt's property but himself.

[LINDLEY, L.J. The substance of the decision is that the

(1) 1 Bing. N. C. 414.
(2) 1 Wil. 328.
(3) 18 Beav. 596.
(4) 28 Beav. 196.
(5) Law Rep. 9 Ch. 244.
(6) Law Rep. 7 H. L. 757.
(7) 24 Ch. D. 339.
(8) Law Rep. 9 Ch. 133.
(9) Law Rep. 10 Ch. 267.
(10) 5 Hare, 469.

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money was not the money of the executrix de son tort, and that the agent must account to the rightful owner.]

A person who touches the money of a bankrupt as a mere messenger or bearer is not liable to the trustee: *Coles* v. *Wright* (1); *Tope* v. *Hockin* (2). Edwards was nothing more than a bearer of the money to Storey.

[BAGGALLAY, L.J. Did *Tope* v. *Hockin* (2) decide anything more than that, in the then state of the law, the creditors' assignee could not avail himself of an act of bankruptcy of which the petitioning creditor could not?]

Winslow, Q.C., and *Sidney Woolf*, for the trustee, were not heard.

BAGGALLAY, L.J. It appears to me that, as soon as the facts and the relative positions of the parties are clearly appreciated, the propriety of the Registrar's order is manifest. A number of cases have been cited to us; many of them have no relation to the law of bankruptcy, though some have. But this observation must be made, that in none of them was the relative position of the parties the same as in the present case. To my mind we derive no assistance from any of the cases, except so far as they illustrate general principles. [His Lordship stated the facts and continued:—] The question is whether the several payments which were made by Edwards to Storey out of the moneys which had been handed to him by Chapman were properly made as against the trustee in the bankruptcy. It is said that they were, because Edwards in receiving the money was acting simply as agent for Storey. Edwards was employed by Storey as his solicitor, and it is said that he was bound to hand over the money which he had received to Storey. I cannot accede to this view. Before any of the payments were made by Chapman to Edwards an act of bankruptcy had been committed by Chapman, and this was well known to Edwards, who was acting as solicitor to Storey in the matter of the petition. He had full notice of the act of bankruptcy. He knew perfectly well that, if an adjudication of

(1) 4 Taunt. 198. (2) 7 B. & C. 101.

bankruptcy was made on the petition, the title of the trustee in the bankruptcy would relate back to the act of bankruptcy, and that all the property which would otherwise have belonged to the bankrupt would be the property of the trustee as from the date of the act of bankruptcy. Knowing this, Edwards handed over the money to Storey. It is sufficient to state the facts in order to shew that, having regard to the relation between the parties, the payments made by Edwards to Storey cannot possibly stand as against the trustee. It would have been a very different thing if an action had been brought to recover Storey's debt. The case of *Sharland* v. *Mildon* (1) shews clearly that if a person is employed as an agent to do a particular thing, and receives money for his principal in the course of his agency, still, if the person who employs him has no right to the money, the agent is not entitled to hand it over to him, and is liable for it to the true owner if he does so hand it over. In my opinion the principle of that case applies to the present.

COTTON, L.J. I am of the same opinion. I will assume that the whole of the money has been paid over by Edwards to Storey. But, notwithstanding this payment, is he not liable for it to the trustee? In my opinion he is. A number of cases have been cited to shew that, in the absence of fraud or some other wrongful act, an agent who has accounted to his principal cannot be made liable to the true owner of the money for which he has so accounted, but very little argument has been addressed to the question whether the payment by the agent in the present case was not a wrongful act. In my opinion it was. An act of bankruptcy had been committed by Chapman, and upon that act a bankruptcy petition had been presented by Storey. Upon a payment being made to him by Chapman, Storey might no doubt have dismissed his petition. The petition, however, was not dismissed. On the contrary, the petition being pending, the payments in question were made by Chapman to Edwards, and, while Storey was still seeking to have an adjudication made against Chapman, Edwards handed over the money which he had thus received to Storey. In my opinion that was wrong. So long as

(1) 5 Hare, 469.

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Storey was seeking to have an adjudication made on his petition he had no right to retain that money which, if he succeeded upon his petition, would have been applicable to the payment of all Chapman's creditors rateably. In my opinion, therefore, the payment by Edwards to Storey was a wrongful act, and we need not deal with the other points which have been argued. It is said that Edwards could not have successfully resisted an action by Storey for the money. In my opinion he could, and no Court would have compelled him to pay it over. It may be (though I give no decided opinion) that, if the petition had been dismissed, Edwards could safely have handed over the money to Storey, if he had had no notice of any other act of bankruptcy. Of course, if he had had notice of another act of bankruptcy, he would have stood in the same position as that in which he now stands. In my opinion the Registrar's order is quite right.

LINDLEY, L.J. I also think that the order is right. Edwards was acting as solicitor for the petitioning creditor; he knew of the act of bankruptcy, and he knew that in a certain event (which has since happened) the person who paid the money to him would have no right to pay it, and that the person for whom he received it would have no right to retain it. Under these circumstances Edwards was not justified in paying over the money to Storey. In principle *Sharland* v. *Mildon* (1) is very like the present case. The appeal must be dismissed with costs.

Appeal dismissed.

August 11. *A. àBeckett Terrell*, for the appellant, asked for leave to appeal to the House of Lords. He referred to *Ex parte Bateman* (2), and urged that the same question might have arisen, not in a bankruptcy, but in an action, when an appeal to the House of Lords would have been of right.

THE COURT (Baggallay, Cotton, and Lindley, L.JJ.) refused the application, saying that the case was not one of any difficulty.

Solicitor for appellant: *Thomas Edwards.*
Solicitors for trustee: *Munns & Longden.*

(1) 5 Hare, 469. (2) 5 D. M. & G. 358.

W. L. C.

[IN THE COURT OF APPEAL.]

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Aug. 12.

EX PARTE HARRISON. IN RE PEAKE.

Bankruptcy—Preferential Debt—Rent—Distress—Landlord—Money due to Gas Company for Gas supplied—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 34.

By their special Act (39 & 40 Vict. c. cxix., s. 44) the corporation of Walsall were empowered to "recover from any person any rent or charge due to them by him for gas supplied, by the like means as landlords are for the time being by law allowed to recover rent in arrear":—

Held, that, after the filing of a liquidation petition by a customer, the corporation were entitled as against the trustee in the liquidation to levy a distress in respect of a sum due by the debtor for gas supplied to him before the filing of the petition:

Held, also, that the corporation were not, within the meaning of s. 34 of the Bankruptcy Act, 1869, "other persons" to whom any rent was due by the debtor, but that, by virtue of s. 44 of the special Act, they were entitled to the rights given to landlords by s. 34.

The payment due to a gas company for gas supplied, though it is called "rent" in some Acts of Parliament, is not really of the nature of rent, and consequently a gas company does not come within the words "other person to whom any rent is due" in s. 34 of the Bankruptcy Act, 1869. Those words apply only to a person who, though he is not the landlord of the bankrupt, fills a position analogous to that of a landlord, because he is entitled to receive that which is "rent" strictly so called.

Decision of Cave, J., affirmed, but on a different ground.

Ex parte Birmingham Gas Light Co. (Law Rep. 11 Eq. 615) and *Ex parte Hill* (6 Ch. D. 63) commented on.

BY a special Act of Parliament, 6 Geo. 4, c. lxxix., the Birmingham and Staffordshire Gas Light Company were incorporated for the purpose of supplying gas to (among other places) the borough of Walsall.

By another Act, 8 & 9 Vict. c. lxvi. (passed in 1845) the powers of the company were enlarged. Sect. 155 of that Act provides that "if any person supplied by the company with gas, gas-pipes, burners, meters, or other apparatus or fittings, shall neglect to pay any rent or charge due to the company for the same, it shall be lawful for the company, or any person acting under their authority, to stop the gas from entering the premises of such person by cutting off the service-pipe to such premises,

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or by such other means as the company shall think fit; and the company may recover the rent or charge due from such person, if less than 20*l.*, together with the expenses (if any) that shall have been incurred in cutting off the gas, and costs of recovering the same, by the same means as landlords are by law empowered to recover rent in arrear." And by s. 187, "When in this Act any sum of money, whether in the nature of penalty or otherwise, is directed to be levied by distress, such sum of money shall be levied by distress and sale of the goods and chattels of the person liable to pay the same."

By an agreement, dated the 23rd of April, 1875, the company agreed to transfer to the corporation of Walsall so much of their undertaking as related to the supply of gas within the limits of the borough of Walsall. This agreement was confirmed by s. 28 of an Act, 39 & 40 Vict. c. cxix., passed in 1876. Sect. 29 provided that the sale under the agreement should be carried into effect by a deed in the form set forth in the 7th schedule to the Act, and that on the execution of that deed so much of the undertaking and property, rights, powers, and privileges of the company as should be comprised in the deed should, by virtue of that deed and the Act, become and should thenceforth be transferred to and vested in the corporation of Walsall. The form of deed given in the 7th schedule assigned to the corporation so much of the undertaking of the company "as relates to the supply of gas within the borough of Walsall, with full authority to exercise the rights, powers, and privileges connected therewith."

By s. 44—"The corporation may, without prejudice to any other remedy, recover from any person any rent or charge due to them by him for gas supplied, or on any account connected with the supply of gas to him, by the like means as landlords are for the time being by law allowed to recover rent in arrear, but the incoming tenant of any premises shall not be liable in respect of any arrears of any such rent or charge accrued before the commencement of his tenancy, unless he has agreed to be liable for the same."

A deed in the form given in sched. 7 was afterwards executed.

On the 12th of November, 1883, Messrs. Peake & Fisher,

trading in Walsall as the Castle Iron Company, filed a liquidation petition in the Walsall County Court. There was then due from them to the corporation for gas supplied to their works the sum of 11*l.* 18*s.* 10*d.*

On the 14th of November the corporation distrained at the works of the debtors for the 11*l.* 18*s.* 10*d.*, and 10*s.* 6*d.* costs.

On the 29th of November resolutions for liquidation by arrangement were duly passed by the creditors, and a trustee was appointed. The resolutions were registered on the 3rd of December.

The trustee took possession of the works of the debtors, which were leasehold, and remained in possession until the 9th of January, 1884, when he disclaimed the lease by leave of the Court. He paid the Christmas rent.

He paid out the distress, and applied to the county court for an order declaring the distress invalid as against him. On the 13th of March the judge declared the distress invalid as against the trustee. The corporation appealed. The appeal was heard on April 7, 1884.

Winslow, Q.C., and *R. V. Williams*, for the appellants. The corporation of Walsall, under their special Act, acquired part of the undertaking of the Birmingham Gas Company with all the "rights, powers, and privileges," of the gas company in relation thereto, and under s. 44 of their special Act, and s. 34 of the Bankruptcy Act, 1869, stood in the position of "other persons to whom rent is due," and were, therefore, entitled to distrain for the gas rent due to them at the date of the liquidation. The case is covered by the decision in *Ex parte Birmingham Gaslight Co.* (1). The Court below followed *Ex parte Hill* (2), but that case is distinguishable. There the gas company could not distrain until after legal process.

A. T. Lawrence, for the trustee. The gas company, quâ creditors, had no special remedies except such as are given them by their special Act, unless they can bring themselves within the words "other person to whom rent is due," in s. 34 of the Bankruptcy Act, 1869. *Ex parte Hill* (2) decides that the price

(1) Law Rep. 11 Eq. 615. (2) 6 Ch. D. 63.

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payable for gas supplied by a gas company is not rent, or analogous to rent, although such sums are spoken of in the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), as rent. The ratio decidendi in that case governs this case and overrules the decision in *Ex parte Birmingham Gaslight Co.* (1) The appellants, therefore, are not in the same position as landlords or other persons to whom rent is due. But even if they are, the Act of the Birmingham Gas Company is not recited in the special Act of the appellants, and all the powers conferred by the old Act did not pass to the appellants merely because they took over a part of the original undertaking. Lastly, the appellants are only entitled under s. 44 of their special Act to distrain for gas due to them from the bankrupts; but this was a distress on goods vested in the trustee for the creditors. The trustee was also an "incoming tenant," as he continued in possession and paid rent for another quarter. He is, therefore, within the saving in the 44th section.

No reply was called for.

CAVE, J. I am of opinion that the decision appealed against is wrong. It is to my mind impossible to distinguish this case from that of *Ex parte Birmingham Gaslight Co.* (1), and although that case was before the Court of Appeal in *Ex parte Hill* (2), and was considered by them, it was not disapproved of. It is true that the Court of Appeal distinguished that case from the case then before them, but that is a very different thing from overruling it. I think this case turns on the words "other person to whom rent is due," in the 34th section of the Bankruptcy Act, 1869. The important words in that description are "other person," and they are used in conjunction with "landlord," which is the preceding word, and the disjunctive "or" is used. Therefore the other person, although not a landlord, must be a person ejusdem generis. He must be a person who, although not a landlord, has rights analogous to the peculiar rights and remedies of a landlord which are dealt with by the 34th section. And, if he is a person who has those rights and remedies, and can by distress obtain payment of some debt due to him, he answers the description of "other person to whom rent is due"

(1) Law Rep. 11 Eq. 615. (2) 6 Ch. D. 63.

in that section. If that is the true construction, the appellant corporation exactly fills that position, because, although they are not landlords, they have under their special Act the same powers and remedies that a landlord has by law to recover rent in arrear. In *Ex parte Hill* (1) the gas company had no power to levy a distress without the intermediation of a justice. They had to resort to a legal process before they could distrain. They had not, in fact, the rights and remedies which a landlord has by law to recover his rent. Here the appellants' special Act empowers them to recover their gas rent "by the like means as landlords are by law allowed to recover rent in arrear." That sufficiently distinguishes the two cases. I am of opinion, therefore, that this appeal must be allowed with costs.

Appeal allowed.

H. L. F.

From this decision the trustee appealed to the Court of Appeal.

July 11, 12, 14. *A. T. Lawrence*, and *Tyrrell Paine*, for the trustee. Sect. 34 of the Bankruptcy Act, 1869, reserves the right of distress only to landlords, and persons in a position analogous to that of a landlord (such as a mortgagee to whom his mortgagor has attorned as tenant, or the owner of a rent-charge) in respect of rent properly so called. The payment made by a consumer of gas to a gas company or corporation which supplies gas, though it is called "rent" in the Gas Works Clauses Act, 1871, and other Acts of Parliament, is not really rent, or of the nature of rent. *Ex parte Birmingham and Staffordshire Gas Light Co.* (2), which decided that the Birmingham and Staffordshire Company had power under their Act, 8 & 9 Vict. c. lxvi., to levy a distress for gas rent due to them at the commencement of the liquidation of a customer, was in effect overruled by *Ex parte Hill.* (1) It is true that in the latter case there was this distinction, that the company could not distrain without first obtaining a warrant from a justice, but that was not the ground of the decision. The payment for gas is analogous to the price of goods supplied by a tradesman. Gas companies have under the Gas Works Clauses

(1) 6 Ch. D. 63. (2) Law Rep. 11 Eq. 615.

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Acts, 1847 and 1871, special means of enforcing payment of the price of gas supplied by them. They can insist on security being given by any person to whom they supply gas, and they can cut off the supply of gas if they are not paid. They do not require the remedy given by s. 34 (1) of the Bankruptcy Act, 1869. The word "rent" in that section must be construed in its strictest sense; *Ex parte Hill* (2) shews that this is so. If the decision of Cave, J., is to be supported, *Ex parte Hill* (2) must be overruled. By s. 187 of the Act, 8 & 9 Vict. c. lxvi., the right to distrain is limited to the goods of the person who is liable to pay for the gas; the power, therefore, does not extend to the goods of the trustee in the liquidation. Moreover, the trustee was an "incoming tenant" within the meaning of s. 44 of the Act of 1876, and therefore he is not liable for the arrears due by the debtors to the corporation.

Winslow, Q.C., and *R. Vaughan Williams*, for the corporation. *Ex parte Hill* (2) does not apply; the gas company in that case had not the power, which the corporation of Walsall have by their special Act, of recovering the money due to them "by the like means as landlords are for the time being by law allowed to recover rent in arrear." *Ex parte Birmingham and Staffordshire Gas Light Co.* (3) was not disapproved in *Ex parte Hill* (2); it was only distinguished. The Walsall corporation have all the powers of the Birmingham company transferred to them by the Act of 1876, so far as relates to the Walsall district, and they have in addition the powers conferred on them by the Act of 1876. The legislature, in transferring the powers of the Birmingham Company to the Walsall corporation, must be taken to have

(1) Sect. 34: "The landlord or other person to whom any rent is due from the bankrupt may, at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for one year's rent accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the overplus due for which the distress may not have been available."

Sect. 42, sub-s. 1, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), is to the same effect.

(2) 6 Ch. D. 63.

(3) Law Rep. 11 Eq. 615.

adopted the interpretation put on those powers by Bacon, V.C., in *Ex parte Birmingham and Staffordshire Gas Light Co.* (1) But at any rate s. 44 gives the corporation the rights which a landlord has after his tenant's bankruptcy under s. 34 of the Bankruptcy Act, 1869, and the limitation imposed by s. 187 of the Act 8 & 9 Vict. c. lxvi. has no application to s. 44 of the Act of 1876. Moreover, at the time when the distress was levied, the trustee had not been appointed; the only persons liable to pay the corporation were the debtors, and their goods were seized. Sects. 12, 13, and 15 of the Bankruptcy Act, 1869, do not affect a landlord's right under a distress for rent. Sect. 15 vests the bankrupt's property in the trustee subject to the provisions of the subsequent sections of the Act: *Ex parte Huggins.* (2) The trustee takes the bankrupt's property subject to the rights given to a landlord by s. 34, and subject to the rights of any other persons to whom the legislature has given rights equivalent to those of a landlord. The landlord is really a secured creditor; he has a right of property. This is the distinction between his position and that of an execution creditor; *Ex parte Hill* (3); the one has a lien, the other has not.

The trustee is not an "incoming tenant" within the meaning of s. 44; he was never a tenant at all. He did not become a tenant by virtue of the relation back of his title; but, if he did, the disclaimer also related back, and put an end to the tenancy. The distress was levied before he entered into possession.

Tyrrell Paine, in reply. Sect. 34 of the Bankruptcy Act, 1869, gives to a landlord a preferential right in the bankruptcy of his tenant; s. 44 of the Act of 1876 confers on the corporation only a remedy against their debtor; it gives them no preference in his bankruptcy as against other persons. The corporation are not secured creditors, for the distress was levied after the commencement of the liquidation.

BAGGALLAY, L.J., after stating the facts, and referring to the provisions of the Acts of 1845 and 1876, continued:—In my opinion, whatever may have been the powers conferred upon the

(1) Law Rep. 11 Eq. 615. (2) 21 Ch. D. 85.
(3) 6 Ch. D. 63.

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original company by the 155th section of their special Act (limited, it may be, by the 187th section), those powers have passed to the Walsall corporation, but they have also, in addition to those powers, the other powers which are conferred on them by their own special Act of 1876. Therefore, to my mind, it is immaterial to consider what rights they have under the provisions of the original Act of 1845. It appears to me impossible to get over the words of s. 44 of the Act of 1876, which, in my opinion, applies to the present case.

There was at the time when the liquidation petition was filed a sum due from Messrs. Peake & Fisher to the corporation for gas supplied, and for that amount a distress was put in. The corporation had by s. 44 the remedy which a landlord has for recovering rent in arrear. The remedy which the Act conferred upon the corporation was being put in force, and this appears to me really sufficient to dispose of the case. But I wish to say a few words as to the authorities which have been referred to.

The first case is *Ex parte Birmingham and Staffordshire Gas Light Co.* (1), the circumstances of which were similar to those of the present case. In that case, immediately after a liquidation petition had been filed, an interim injunction was granted by a county court, professedly under the 13th section of the Bankruptcy Act of 1869, restraining the company from further proceeding with a distress which they had levied on the property of the liquidating debtors, which was taken to be a legal proceeding on behalf of the company. Afterwards, the creditors having resolved upon a liquidation by arrangement, and appointed a trustee, the injunction was made perpetual. From that injunction an appeal was presented to Bacon, V.C. The substantial question for him to consider was whether the distress was "an execution or legal process" within the meaning of the 13th section,—whether there had been "proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt provable in bankruptcy." Having regard to the terms of the 155th section of the special Act of 1845, the Vice-Chancellor was of opinion that the power of distress which was thereby conferred on the company—a power to levy a distress of

(1) Law Rep. 11 Eq. 615.

the same nature and of the same kind which a landlord was entitled to put in for arrears of rent—was not a legal process within the meaning of the 13th section of the Bankruptcy Act. No doubt he had regard to the terms of the 155th section, because, without that section, there would have been no right on the part of the gas company to recover the amount due to them for gas by distress. The 155th section gave them that power. The Vice-Chancellor's attention does not seem to have been directed very prominently to the 187th section of the special Act, which limited the right of distress to the goods of the person liable to pay the debt, for I do not find that it is adverted to in his judgment, though it was referred to in the course of the argument.

The other case is *Ex parte Hill.* (1) That was a very different case. There the special Act did not give the company the same power to recover money due for gas as a landlord has to recover rent in arrear; but, as the head-note states it, "The special Act of a gas company empowered them to levy by distress all sums of money due to them for the supply of gas, the amount of which should not be disputed, and provided that any justice, on application, might inquire into and ascertain the amount due, and issue his warrant accordingly for levying the same." That is not the simple form of distress of which a landlord could take advantage; it is a special form of distress, and the Court held that "the company did not come within the words 'landlord or other person to whom any rent is due from the bankrupt' in s. 34 of the Bankruptcy Act, 1869, but that the distress was a legal process against the estate of the debtor in respect of a provable debt, which the Court had under s. 13 of the Act, or under rule 260 of the Bankruptcy Rules, 1870, power to restrain." The distress was clearly a legal process against the estate of the debtor, and upon that ground I think the decision in *Ex parte Hill* (1) is to be supported. I was a party to the judgment, and it does not, I think, in any way conflict with the judgment of Bacon, V.C., in the other case. The distress, as it appears to me, was in the nature of a legal process for enforcing the payment of a debt due, and it came within the 13th section of the Bankruptcy Act, 1869, and not within the 34th.

(1) 6 Ch. D. 63.

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The present case does not, as it appears to me, depend on either of those cases. The circumstances are quite different. The 44th section of the special Act gives the corporation a very wide power, and authorizes them to do that which they have done.

Under the circumstances I think the view which Cave, J., has taken is the true one.

COTTON, L.J. This is an important case both to gas producers and to gas consumers. In the Court below it appears to have been decided on the ground that the corporation had a right to distrain under the 34th section of the Bankruptcy Act, 1869, as being "*other persons* to whom *rent* was due from the debtors." It is said that in various Acts of Parliament the charge payable for gas is called "rent," and that, therefore, although the corporation are certainly not landlords, they are persons other than a landlord to whom what an Act of Parliament has declared to be "rent" was due, and that they had the right of a landlord to distrain for it.

Now, if there was nothing more in the case, I should be of opinion that the decision appealed from was wrong, because I still adhere to the opinion which I expressed in *Ex parte Hill* (1), that the words "other person to whom any rent is due," in s. 34, must mean a person to whom "rent" properly so called, with the legal incidents of rent, is due,—a person who stands, not exactly in the position of a landlord, but in a somewhat analogous position. But that is not all in the present case; it really turns on the provisions of s. 44 of the Act of 1876.

I will deal first with the objection that the trustee must be considered as an "incoming tenant," and that, the goods being his by virtue of the relation back of his title, it would not be right to give effect to the distress, which was levied after the presentation of the liquidation petition, though before the appointment of the trustee.

In my opinion the trustee cannot be considered as an "incoming tenant." He was not the tenant at all till a period far remote; he was not in fact tenant at the time when the distress was levied, and he cannot, in my opinion, be considered, within

(1) 6 Ch. D. 63.

the fair meaning of s. 44, "the incoming tenant," on whose goods no distress could be levied in respect of the rent or charge due to the corporation for gas supplied by them before he became tenant.

It comes, therefore, to this, that the corporation are, under s. 44, entitled to recover the sum due to them for gas supplied "by the like means as landlords are for the time being by law allowed to recover rent in arrear." There was a power very like this given by s. 155 of the previous Act of 1845, but there was, as it appears to me, a restriction upon it by s. 187, that it should only be exercised as against the goods of the person from whom the rent was due. But, whatever may be the effect of s. 187 on the power given by s. 155, in the present case the corporation are relying, not solely on the powers of that Act, but upon the new power given by s. 44 of the Act of 1876, which is without any restriction, except that which I have already dealt with, that "the incoming tenant" is not to be liable, that is, to have his goods taken, in respect of a charge accrued before the commencement of his tenancy. It is on this power, and on this alone, without reference to the restriction imposed by s. 187 of the earlier Act, that, in my opinion, we must take our stand, and then we have this, that the corporation may enforce payment of the charge "by the like means as landlords are for the time being by law allowed to recover rent in arrear." It is said that this is merely meant to point out the process by which they may enforce their claim, and not to give them any preferential right. But if the process, when put in force, does of itself give a preference, it follows, in my opinion, that the corporation may obtain the same result and the same benefit by putting it in force as landlords are by law allowed to obtain by it. Then we come to s. 34 of the Bankruptcy Act, 1869, the effect of which is to give landlords, with certain restrictions, certain rights in case of the bankruptcy of their tenants. Here the corporation may enforce payment by those means which are allowed to landlords for the recovery of rent in arrear, and, in my opinion, so far as s. 34 gives any power to landlords, so far as it frees them from any difficulty which they would otherwise have had in recovering their rent, and so far also as it imposes restrictions on them in

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enforcing their remedy by distress, both the benefits given and the restrictions imposed by s. 34 apply to the corporation by virtue of s. 44 of their Act of 1876. We need not refer to the words in s. 34, "other person to whom any rent is due." Sect. 44 is a statutory declaration that the corporation, for the purpose of recovering any sum due to them for gas supplied, are to have the same remedies as landlords have for recovering rent in arrear. Strike out from s. 34 everything except that which relates to landlords, and it comes to this, that the power is given to this corporation of recovering their gas charge by distress or by any other remedy which a landlord has for recovering rent in arrear. In my opinion, therefore, by virtue of s. 44 of this particular Act, the corporation had a right to enforce the gas charge in question by the distress which was put in.

LINDLEY, L.J. I am of the same opinion. This is not the first time that the Court has found a difficulty in construing two Acts of Parliament—a special Act and a general Act—which have to be read together. It is true that, owing to circumstances which I am not able to explain, the charge for gas supplied, which is in truth neither more nor less than the price of goods sold and delivered, has come to be called "gas rent," and it is so called in the Gas Clauses Act, 1847, as well as in the Gas Clauses Act, 1871. But, notwithstanding that, it is not right to say that gas rent is "rent" within the meaning of s. 34 of the Bankruptcy Act, 1869, or of any other Act, unless there is something else to shew that such a charge is to be considered as "rent." I will say nothing about the true construction of ss. 155 and 187 of the Act 8 & 9 Vict. c. lxvi. I do not think it necessary to consider the operation of those sections. It would, in my opinion, require a good deal of consideration before we could safely say whether s. 155 is qualified by s. 187, which is very special in its language. But the corporation have the power which is given to them by s. 44 of their Act of 1876. [His Lordship read the section.]

Now the gas consumer is the person from whom the rent or charge is to be recovered "by the like means as landlords are for the time being by law allowed to recover rent in arrear," and the

question is by what means landlords are allowed to recover rent in arrear. Then we go to s. 34 of the Bankruptcy Act, 1869, and the question arises, Why should not this corporation be entitled to distrain after the bankruptcy by virtue of these two sections? I cannot see any reason why they should not. It seems to me that the case is exactly within s. 34, and that we cannot escape from that construction. I do not think that the corporation is in the position of any "other person to whom any rent is due" within the true meaning of s. 34. The language of that section is a little confused, but I take it "the landlord" means the immediate landlord of the bankrupt, and the words "the landlord or other person" include any person who is in the same position as a landlord, and is entitled to distrain for rent properly so called. For instance, it often happens that there are two or three landlords entitled to two or three ground-rents, one after the other, and they can all distrain. The words would include also a mortgagee to whom the mortgagor has attorned as tenant. The words mean that a landlord, or any person in an analogous position, may distrain for rent. They do not include a gas company, although the charge for gas is sometimes called a "rent." I cannot come to the conclusion that the Walsall corporation, or any gas company, is a "person to whom any rent is due" within the true meaning of s. 34 of the Bankruptcy Act; but I cannot escape from the conclusion that this corporation is, under s. 44 of its special Act, entitled to the ordinary remedies allowed to landlords for recovering rent in arrear.

Appeal dismissed with costs.

Aug. 12. *A. T. Lawrence,* for the trustee, asked for leave to appeal to the House of Lords.

THE COURT (Baggallay, Cotton, and Lindley, L.JJ.) refused the application.

Solicitors for trustee: *Duignan, Smiles, & Co., for Duignan, Lewis, & Elliot, Walsall.*

Solicitors for corporation: *Sharpe, Parkers, & Co., for Wilkinson, Gillespie, & Wilkinson, Walsall.*

W. L. C.

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Aug. 8.

[IN THE COURT OF APPEAL.]

EX PARTE DEVER. IN RE SUSE.

Bankruptcy—Bill of Exchange drawn against Goods—Specific Appropriation of Consignments—Insolvency of Acceptor—Rights of Bill-holder and Drawer—Interest credited by Acceptor to Drawer.

Bankers in London, at the request of M., who was acting as the agent in London of S., a merchant at Shanghai, on the 16th of March, 1883, granted to S. a letter of credit for 20,000*l.* The letter authorized S. "to draw on us four months' sight for any sums not exceeding 20,000*l.*, such draft or drafts to be accompanied by bills of lading and invoices of tea, purchased according to order of M., and shipped by steamers to London, and marine insurance policies relating thereto, and these documents to be surrendered to us against our acceptances. And we hereby agree with you, and also as a separate engagement with the bonâ fide holders respectively of the bills drawn in compliance with the terms of this credit, that the same shall be duly accepted on presentation and paid at maturity, if drawn and negotiated on or before the 31st of December, 1883." It was agreed that a commission of 1 per cent. should be paid to the bankers on all drafts drawn under the credit, and M. agreed that he would meet all the acceptances on or before their due dates, "the usual rate of 2½ per cent. being allowed on all prepayments." Bills were drawn by S. under this credit against various parcels of tea consigned by him to M. for sale. In each case the bill mentioned the parcel of tea against which it was drawn, and purported to be drawn under the letter of credit, the date of which was mentioned, and the bills of lading and other shipping documents were in each case attached to the bill. S., in each case, advised the bankers of the drawing of the bill, mentioning the tea against which it was drawn and the name of the vessel by which it was shipped. S. discounted the bills with a Chinese bank, and their agent in London presented the bills for acceptance, and in exchange for the acceptance delivered the bills of lading and other documents attached to the London bankers, in whose name the tea was then warehoused with a dock company. As M. from time to time required portions of the tea for delivery to purchasers the bankers handed to him warrants or delivery orders, he paying them the value of the tea comprised therein. The moneys thus received were paid to the credit of the general current account of the bankers with their own bankers. In an account in their books with M., they debited him with the amounts of the acceptances and credited him with the amounts received by the sales and with 2½ per cent. according to the agreement.

The London bankers suspended payment and filed a liquidation petition before their acceptances matured:—

Held, that, having regard to the terms of the letter of credit, the bill-holders could not claim any specific appropriation of the teas to meet the acceptances:—

But, *held*, that S. was entitled to have the teas which remained in specie at the date of the suspension (but not the proceeds of the sale of the teas which were sold before the suspension) applied in payment of the acceptances.

Frith v. *Forbes* (4 D. F. & J. 409) distinguished.

APPEAL from a decision of Mr. Registrar Pepys.

W. V. Sentance was a merchant, carrying on business at Shanghai in China; J. S. Mussett was a merchant carrying on business in London; Messrs. W. E. Sibeth, C. J. Sibeth, Albert Sibeth, and P. F. T. Sibeth, were merchants and bankers, carrying on business in London, under the firm of Suse & Sibeth. In and prior to 1883, Sentance was in the habit of making consignments of tea to Mussett. On the 16th of March, 1883, Mussett applied to Suse & Sibeth to grant a credit of 20,000*l.* to Sentance, which they agreed to do on the terms embodied in a letter which was written subsequently the same day by Mussett to them. The material part of the letter was as follows:—

"In accordance with my verbal arrangement of this morning I will thank you to send your confirmed credit to Mr. W. V. Sentance of Shanghai for 20,000*l.*, to be used by him against shipments of tea to this port. Marine insurance to be effected in China, and, in addition to the usual documents accompanying the drafts, there will be the marine policies of first-rate China companies settling claims in London. Mr. W. V. Sentance takes one half share in this business. With regard to the other half share it is understood you are to have the option till end of this month of deciding whether you will participate in the venture and to what extent. Should you not participate, then the customary banking commission of 1 per cent. is to be paid you on all drafts drawn under this credit. It is further arranged that I meet all your acceptances on or before their due dates, the usual rate of 2½ per cent. being allowed on all prepayments."

On the same day Suse & Sibeth addressed the following letter of credit to Sentance:—

"At the request of Mr. J. S. Mussett of this city, we hereby authorize you to draw on us four months sight for any sums not exceeding 20,000*l.*, such draft or drafts to be accompanied by bills of lading and invoices of tea, purchased according to order of Mr. Mussett, and shipped by steamers to London, and marine insurance policies relating thereto of first-rate China companies settling claims in London, and these documents to be surrendered to us against our acceptances. And we hereby agree with you, and also as a separate engagement with the bonâ fide holders

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respectively of the bills drawn in compliance with the terms of this credit, that the same shall be duly accepted on presentation and paid at maturity, if drawn and negotiated on or before the 31st of December, 1883."

On the 17th March, 1883, Suse & Sibeth wrote to Mussett as follows:—

"In reply to your favour of the 16th inst., we beg to say that we have confirmed for your account of Mr. W. V. Sentance of Shanghai the credit of 20,000*l.*, together with the conditions attaching thereto. To the further contents of your letter we shall recur between this and the end of the month."

On the 31st March, 1883, Suse & Sibeth again wrote to Mussett, telling him that after mature consideration they had "decided upon adhering to our intention, expressed to you verbally some time ago, of financing your tea imports without participation in the venture, but simply as bankers for the customary banking commissions mentioned by you and subject to the usual conditions."

Under the letter of credit of the 16th March, Sentance during the year 1883 made various consignments of tea from China to Mussett in London, and in respect of each particular consignment he drew a bill of exchange on Suse & Sibeth. One of the bills so drawn was as follows:—

"No 113. Exchange for 1197*l.* 6*s.* 1*d.*

"Hankow, 21st of May, 1883.

"Four months after sight of this second of exchange (first of the same tenor and date unpaid), pay to the order of myself the sum of 1197*l.* 6*s.* 1*d.*

Drawn under your documentary letter of credit No. 1014 dated 16/3, 1883, value received, which place to account of $\frac{P}{M}$ of 1/3 354 $\frac{1}{2}$ chests tea per Stirling Castle as per shipping documents herewith.

(Signed) W. V. Sentance."

"To Messrs. Suse & Sibeth."

The other bills were in the same form, mutatis mutandis. The bills drawn under the credit amounted in the whole to the sum

of 18,670*l.* 14*s.* They were drawn between the 17th of May and the 6th of June, 1883, and they matured between the 28th of October and the 24th of November, 1883. Sentance advised Suse and Sibeth by letter of the drawing of each bill. One of the letters of advice was as follows:—

"I beg to advise having valued upon your good selves under your letter of credit No. 1014, dated the 16th of March, 1883, by my draft at four months' sight favour myself, which I have negotiated as undernoted blank, indorsed to the Hongkong and Shanghai Bank, who hold all shipping documents, being for cost of the following shipment tea—one chop of tea per *Laertes*.

"Yours faithfully,

"(Signed) W. V. Sentance."

"Particulars of drafts,

"190. £273 11*s.* 8*d.* ex. 5/1¼ against T.S.I. 161½ ℔ tea."

The other letters were in the same form, mutatis mutandis.

Sentance discounted all the bills with the Hongkong and Shanghai Bank, to whom the bills of lading and shipping documents were handed attached to the drafts. The letter of credit was shewn to the Bank. The invoices of the tea were sent by Sentance direct to Mussett. The bills of exchange, with the bills of lading and shipping documents attached, were on their arrival presented by the London agency of the Bank to Suse and Sibeth for acceptance, and were (with one exception) duly accepted by them, and in each case, on the acceptance of the bill, the attached documents were surrendered to Suse & Sibeth in accordance with the terms of the letter of credit. On the presentation of the bills for acceptance Suse & Sibeth in each case wrote to Mussett informing him thereof, and that they had noted the bills to his debit. They did not send any such notification to Sentance.

On the arrival and discharge of the tea in London it was warehoused with the London and St. Katharine Dock Company in the name of Suse & Sibeth, who paid the freight, and they debited Mussett in an account which they kept against him in their books with the amount of the freight and of any other disbursements in respect of the teas. Suse & Sibeth, on receiving the bills

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of lading, lodged them with the dock company, and Mussett from time to time instructed the dock company to issue weight notes and warrants in the names of brokers nominated by him, and to deliver the notes to the brokers and the warrants to Suse & Sibeth. As sales of the tea were from time to time effected by Mussett, and delivery was required by the purchasers, Mussett sent a written request to Suse & Sibeth to deliver to him the warrant for the tea thus sold and of which delivery was required, and at the same time Mussett paid to Suse & Sibeth a cheque for the value of the tea stated in the request, and that amount was thereupon credited to Mussett in the above-mentioned account. If the tea was required before the corresponding warrant had been made out, Mussett sent to Suse & Sibeth a written request for a delivery order instead of a warrant. If more than one request was lodged during the same day Mussett included in one cheque the values mentioned in the different requests. In no case did he in making the request or payment specify the particular acceptance against which he made the payment, nor did any one payment, or the aggregate of payments made in any one day, correspond to any particular acceptance.

The mode of keeping the account with Mussett in the books of Suse & Sibeth was as follows: As the bills were presented by the holders for acceptance the amounts thereof were debited to the account as of the dates of the acceptances, but no entry was made in the account to shew the special parcels of tea against which the drafts had been drawn.

On the 4th of October, 1883, Suse & Sibeth suspended payment, and on the 9th of October, 1883, they filed a liquidation petition, under which a trustee was afterwards appointed. Prior to the 4th of October Suse & Sibeth had received from Mussett in respect of tea delivered sums amounting in the whole to 8361*l.*, out of which they had paid freight and other charges. The whole of the 8361*l.* had been paid by them as received to the general credit of the firm with their bankers, and applied with other moneys of the firm in the ordinary course of business. At the date of the stoppage Suse & Sibeth had also in their possession delivery orders or warrants for other parcels of tea which had been consigned by Sentance under the letter of

credit and which had not been sold. The tea thus remaining in specie was afterwards sold by the trustee, and the proceeds of sale were carried to a special account. At the date of the stoppage there was a balance in favour of Mussett on this particular account with Suse & Sibeth, but he was indebted to them on other accounts.

On the application of Sentance and the Hong Kong Bank the Registrar, on the 29th of May, 1884, made an order declaring "that the applicants, or one of them, are or is entitled to have the respective bills of lading and the parcels of tea the subjects of such bills of lading respectively, referred to in certain acceptances set forth in the schedule to this order, and all such moneys as on inquiry may be found to have been received by the above-named debtors before the liquidation, and remaining in their hands or to their credit with the debtors' bankers at the date of the liquidation, and by the receiver or trustee since the liquidation, after payment of freight and other charges, by means of the realization of such parcels of tea or any of them, applied for the purpose of paying the said acceptances." The schedule contained a list of all the acceptances under the letter of credit.

From this order the trustee appealed.

Cohen, Q.C., and *Sidney Woolf*, for the appellant. There was no trust of the proceeds of the sale of the tea for the persons who were interested in the bills of exchange. It is a material circumstance that the bills of lading were to be handed over to Suse & Sibeth, not when they paid the bills of exchange, but when they accepted them. This shews that the consignor had got all the security he bargained for when he had got the acceptance by Suse & Sibeth of the bills of exchange. The Hong Kong bank would not have discounted the bills if they had not been accepted by Suse & Sibeth. The letters of credit gave the bank notice that the bills of lading were to be surrendered to the acceptors on acceptance. The bills of lading were attached to the drafts, not for the protection of the drawer of the bills or of the holder, but for the protection of the acceptors. Mussett is not a party to the present application. The fact that Mussett was allowed 2½ per cent. interest on all prepayments

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shews that Suse & Sibeth were at liberty to use the money, when they received it, as they pleased, and that there was no specific appropriation to meet the acceptances: *In re Broad.* (1) Sentance has given no evidence. *Banner* v. *Johnston* (2) is very analogous to the present case, and shews that the bill-holders have no lien on the teas or on the proceeds of their sale.

R. Vaughan Williams, for Sentance. *Banner* v. *Johnston* (2) does not apply. The teas were appropriated by the contract between the parties to the meeting of the acceptances, and the proceeds of sale were subject to the same trust. The payment of interest does not shew that Suse & Sibeth were entitled to use the money as they pleased. Mussett was acting only as agent for Sentance in the transaction. Suse & Sibeth had distinct notice that the venture was that of Sentance. The bills of lading were attached to the drafts, and each draft referred to a specific parcel of tea. What was the intention of Sentance in sending the teas, and what was the bargain with him? Clearly that the proceeds of the sale of the teas should be employed in meeting the acceptances.

[COTTON, L.J. Does the trustee dispute the right of Sentance to have the teas which remained unsold at the date of the stoppage delivered up to him on his paying the acceptances?

Sidney Woolf. The trustee offered to do that long ago, and he adheres to the offer.]

Sentance is equally entitled to the proceeds of the teas which were sold before the stoppage. He is the owner of the equity of redemption, Mussett being only his agent.

[COTTON, L.J. The letter of credit says that the tea was to be purchased according to the order of Mussett.]

That only means that the agent in London will inform his principal in China. The allowance of 2½ per cent. was not really an allowance of interest. Suse & Sibeth ought to have ear-marked the proceeds of sale by paying them to a separate account with their bankers. Their bankers would then have allowed them interest on the amount standing to the credit of that account, and for that interest they would be bound to account to Sentance. That is what the allowance of 2½ per cent. means.

(1) Ante, p. 740. (2) Law Rep. 5 H. L. 157.

Pollard, for the Hong Kong Bank. The bank are entitled to a lien or charge on the teas and the proceeds of sale, by virtue of the form of the bills of exchange. Such a charge may be created by the mere form of a bill of exchange, without any express statement: *Frith* v. *Forbes* (1). In all the cases which have been decided to the contrary the transactions were between vendor and purchaser; not as here, between consignor and consignee. *Frith* v. *Forbes* (1) is almost identical with the present case. The only difference is that in that case *Frith & Co.* were expressly named in the bills of exchange, while in the present case the bills are drawn to the order of the drawer, but this distinction is immaterial. In the present case there is also the letter of credit to shew the appropriation. It is true that *Frith* v. *Forbes* (1) was not followed in *Robey & Co.* v. *Ollier* (2), but the Court distinguished that case from *Frith* v. *Forbes* (1), and recognised the authority of *Frith* v. *Forbes* (1). In *Robey & Co.* v. *Ollier* (2) there was a joint adventure between the drawer of the bills and the consignees of the cargo. No arrangement made between Mussett and Sentance can affect the rights of persons who have acted on the faith of the letter of credit.

[COTTON, L.J. No doubt the owner of the goods would be entitled to redeem them on taking up the bills of exchange, but it is a different matter when the person who held the proceeds of the sale of the goods has become a bankrupt.]

In re Agra and Masterman's Bank (3) shews that by virtue of the letter of credit the Hong Kong Bank are entitled to have the proceeds of sale applied in payment of the bills, and have also the right of proof in the liquidation.

[COTTON, L.J. How do they prove that the letter of credit was shewn to them?]

The bills of exchange expressly refer to it.

[LINDLEY, L.J. How do they make out that the security of the letter of credit has been transferred to them?]

The form of the bills of exchange shews this; the facts are

(1) 4 D. F. & J. 409. (2) Law Rep. 7 Ch. 695.
(3) Law Rep. 2 Ch. 391.

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substantially the same as those of *Frith* v. *Forbes*. (1) The principle of that decision applies, and shews that the bill-holders are entitled to have the teas which were in specie at the time of the suspension applied in paying the acceptances. They are also entitled to have the proceeds of the teas which were sold before the suspension applied in the same way. The bills of exchange were in such a form as to give the bill-holders an equitable lien on the goods.

[COTTON, L.J. The question is, whether the documents taken altogether give the Hong Kong Bank such a security.]

The reference in the bills to the letter of credit cannot destroy the security which is given by the form of the bills. The Hong Kong Bank could have obtained an injunction to restrain Suse & Sibeth from parting with the bills of lading as security for a pre-existing debt. The teas were in the hands of Suse & Sibeth, subject to a trust in favour of the bill-holders, and when the teas were sold the proceeds were subject to the same trust. And, there being this trust, it will be assumed that, when Suse & Sibeth drew moneys from their bankers for their own purposes, they drew out their own moneys in preference to the trust moneys: *In re Hallett's Estate*. (2) No dealings between Suse & Sibeth and other persons can affect the rights of the Hong Kong Bank. As to the allowance of 2½ per cent., it was merely a rebate for the prepayment of the bills. 2½ per cent. is the rate of interest usually given for money deposited for a short period.

Sidney Woolf, in reply.

As to the Hong Kong Bank:—

They had no right to prevent Sentance and Suse & Sibeth from dealing with the teas in any way they pleased. The only document (other than the bills of exchange) which they could have seen was the letter of credit of the 16th of March, written by Suse & Sibeth to Sentance, and their rights must depend on that. That letter expressly stated that the teas were to be purchased according to the order of Mussett, and that the bills of lading were to be surrendered to Suse & Sibeth against their acceptances of the bills of exchange. After the bills of lading

(1) 4 D. F. & J. 409. (2) 13 Ch. D. 696.

had been surrendered, how is it possible for the bank to say that they had any equitable charge on the goods or any right to interfere with the disposition of them? *Frith* v. *Forbes* (1) did not decide any principle whatever; it depended on its own special facts. This is clear from *Ex parte Arbuthnot.* (2) The decision in *Frith* v. *Forbes* (1) amounted to no more than this, that an agent cannot set up a general right of lien contrary to the express directions of his principal. Moreover, *Frith* v. *Forbes* (1) is inconsistent with *Banner* v. *Johnston.* (3)

[He was stopped by the Court on this point.]

As to the claim of Sentance:—

The result of the evidence is that Mussett, not Sentance, was the owner of the teas. Mussett was the principal, and Sentance was only his agent. The trustee has cross-claims against Mussett. Mussett in no way asserts that he was only acting as agent for Sentance, and Sentance has not given any evidence at all. The Registrar's order should be discharged in toto.

BAGGALLAY, L.J. This case is somewhat singular in its circumstances. [His Lordship stated the facts and continued:—] It is suggested on behalf of the appellant (I do not propose to deal with this question now) that Mussett was the real adventurer, and that Sentance is put forward to make this claim, because, if it was made by Mussett, some questions of set-off would arise which do not arise as against Sentance. There are two questions for our decision; one, as to the rights of Sentance, the other as to the rights of the Hong Kong Bank. With regard to the position of the bank, I am of opinion that they are not entitled to the declaration which the Registrar has made in their favour. The bills of exchange were drawn expressly with reference to the letter of credit, and that letter contains a distinct statement that the bills of lading were to be surrendered to the acceptors on their accepting the bills of exchange. The acceptors acquired, under the letter of credit, a right to the bills of lading, and the holders of the bills of exchange cannot be heard to assert any right to them as against the acceptors. The particular form of

(1) 4 D. F. & J. 409. (2) 3 Ch. D. 477.
(3) Law Rep. 5 H. L. 157.

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the letter of credit, the express statement in the bills that they were drawn under it, and the communication by the drawer to the acceptors that they had been so drawn, make it clear that the bill-holders have no such right as that which they claim.

The other question is one of greater difficulty, and we must take time to examine the evidence more closely on the question whether Mussett or Sentance was the real adventurer.

COTTON, L.J. I will say nothing now about the claim of Sentance. With regard to the claim of the bill-holders, Mr. Pollard contended that, having regard to the terms of the letter of credit, and to the fact that the bills were drawn with reference to it, each particular bill being drawn to the credit of a particular shipment of tea, a lien or charge on the tea was given to the holder of the bill. I am unable to arrive at that conclusion. Mr. Pollard relied on the decision in *Frith* v. *Forbes*. (1) That case, however, was decided on its own very special circumstances, and, in my opinion, it is no authority in the present case. *Banner* v. *Johnston* (2) and the cases in the Court of Appeal which have been referred to are much more like the present case. The form of the bill of exchange and of the letter of advice, written at the time by the drawer to the acceptors, did not give the bill-holders any lien on the goods. We must have regard to the terms of the letter of credit, which the bill-holders saw, and they are conclusive on this point. The bills of exchange were to be accompanied by the bills of lading, but the bills of lading were to be surrendered to the acceptors of the bills of exchange against their acceptances. What is the meaning of that? So long as the bill of lading is annexed to the bill of exchange, the bill-holder has a lien on the goods. But the bill of lading is to be surrendered to the acceptor on his acceptance of the bill of exchange. That must mean that it is to be delivered up free from the lien of the bill-holder. If the bill of exchange and the letter of advice are ambiguous, they must be taken subject to the terms of the letter of credit which was shewn to the person who discounted the bill. In my opinion, the terms

(1) 4 D. F. & J. 409. (2) Law Rep. 5 H. L. 157.

of the letter of credit are conclusive against the claim of the bill-holders.

LINDLEY, L.J. I am of the same opinion. It appears to me that there is much more difficulty with regard to the claim of Sentance, and I will say nothing about it until I have had an opportunity of studying the affidavits more carefully. But the case of the bill-holders is clear. They say that they have a lien on the goods, and it is for them to make out that they have. They do not acquire a lien simply because the bills are drawn against the goods. They must shew that the lien has been in some way transferred to them by the drawer. That this is so is shewn by *Inman* v. *Clare*. (1) But in the present case, when the documents are looked at, it is plain that no such right has been transferred to the bill-holders. There is nothing in the bills of exchange themselves, or in the letters of advice, which can operate to transfer any right of lien to the bill-holders. It is true that the bills of lading were attached to the bills of exchange, and that is, no doubt, a very important circumstance, but the bargain was that the bills of lading should be given up to the acceptors of the bills of exchange on their acceptance.

As regards the authorities, I think that *Robey & Co.* v. *Ollier* (2) is the nearest to the present case. In that case *Frith* v. *Forbes* (3) was explained, and it is clear that it was a very peculiar case. I think that the present case is undistinguishable in principle from *Robey & Co.* v. *Ollier*. (2)

Aug. 8. LINDLEY, L.J., delivered the judgment of the Court as follows: We have already decided as to the rights of the bill-holders, but we took time to look more closely into the affidavits and documents before deciding as to the rights of Sentance, who was the drawer of the bills and the actual remitter of the goods. His claim was to have those teas which remained unsold at the date of the suspension of payment of Suse & Sibeth applied in taking up the bills, and also to have the

(1) Joh. 769, 776. (2) Law Rep. 7 Ch. 695.
(3) 4 D. F. & J. 409.

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proceeds of those teas which had been sold before the suspension similarly applied.

As to the teas which remained unsold at the date of the suspension, having regard to the documents and the facts which have been laid before us, it appears to us that Sentance, as the drawer of the bills and the remitter of the goods, is entitled to have the proceeds of those teas applied in taking up the bills so far as those teas will go.

But, as regards the proceeds of the teas which were sold before the suspension, the case is different. We do not see our way to hold that Sentance has any equitable right or lien as regards these moneys, or to treat them as subject to any trust, or that he can insist upon having them applied as the unsold teas are applicable. In other words, as regards the proceeds of the teas which were sold before the suspension, the case is governed by the authorities to which Mr. Cohen referred us, and which are undistinguishable.

This being so, we must discharge the order appealed from, and instead of it we must substitute a declaration that Sentance is entitled to have the respective parcels of tea which remained unsold at the date of the suspension, after payment of the freight and charges incidental to the sale of such parcels, applied to the payment of the acceptances.

Then, as regards the costs, it appears to us that the trustee has not substantially been put to any extra costs by the course which has been taken by the bank, and, as regards Sentance, he is partly right and partly wrong, and therefore the only order we propose to make is that the trustee shall have his costs out of the estate.

Solicitors for trustee: *Roberts & Barlow.*
Solicitors for Sentance: *Reyroux, Phillips, & Golding.*
Solicitor for Hong Kong Bank: *Ambrose Parsons.*

W. L. C.

[IN THE COURT OF APPEAL.]

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May 30.

READ *v.* ANDERSON.

Gaming—Betting—Employment of Agent to bet in his own Name — Implied Authority to pay Bet—When Authority is irrevocable—8 *&* 9 *Vict. c.* 109, *s.* 18.

The employment of an agent to make a bet in his own name on behalf of his principal may imply an authority to pay the bet if lost, and on the making of the bet that authority may become irrevocable.

So *held*, by Bowen and Fry, L.JJ., Brett, M.R., dissenting.

Judgment of Hawkins, J. (10 Q. B. D. 100) affirmed.

APPEAL by the defendant from the judgment of Hawkins, J., in favour of the plaintiff, after trial upon further consideration.

The facts of the case are fully stated in the report of the judgment of Hawkins, J. (1), and also are briefly mentioned in the judgments of Brett, M.R., and Bowen, L.J., hereinafter set forth.

May 8. *Petheram, Q.C.*, and *Mitcalfe Dale*, for the defendant. As this action was tried without a jury, the Court of Appeal can review the decision of Hawkins, J., as to the inferences to be drawn from the facts proved before him. The contract between the plaintiff and the defendant was one of employment. It is not denied for the defendant that if the plaintiff had paid the amount of the bets before the revocation of the authority conferred upon him, the defendant would have been liable to him; but the defendant had at any time before payment by the plaintiff power to revoke the authority conferred upon him, and accordingly did revoke it. *Hampden* v. *Walsh* (2) and *Diggle* v. *Higgs* (3) are in point for the defendant upon this branch of the argument. The pressure, which might be put upon the plaintiff if he failed to pay to the winners the bets lost by the defendant, is an inconvenience to him of which the law will not take notice: the injury to the plaintiff would merely consist of an exclusion from

(1) 10 Q. B. D. 100. (2) 1 Q. B. D. 189.
(3) 2 Ex. D. 422.

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Tattersall's, and the effect of the view taken by Hawkins, J., is to make the betting at Tattersall's recognised by law. It may be that a principal is bound to indemnify his agent: *Thacker* v. *Hardy* (1); but the right to indemnity exists only in respect of claims which may be lawfully made against the agent; and in the present case the plaintiff would not have been subject to any claims enforceable by law, if he had refused to pay the bets in dispute to the winners.

Finlay, Q.C. (*R. A. McCall* with him), for the plaintiff. The question is whether Hawkins, J., has correctly inferred what was the contract between the plaintiff and the defendant. The present case is not to be treated as one of principal and agent. The liability of the plaintiff to the winners of the bets was a sufficient consideration for the defendant's implied promise to indemnify the plaintiff. It is unnecessary that the plaintiff should have been under a legal liability to pay the bets lost; it is sufficient that he was under an obligation of some kind to a person other than the defendant. If the plaintiff did not pay the bets to the winners thereof, he would be worse off than if he were exposed to an action: the consequence of failing to meet his engagements would be ruin to him: he made himself liable to pay the bets according to the code of the turf, only because he trusted to the indemnity of the defendant. In *Rosewarne* v. *Billing* (2) a clear opinion was expressed by Erle, C.J., that an action will lie against the loser of a wager for money paid at his request to the winner thereof. The defendant had no power to revoke the authority to pay the bets which he had lost, because he had contracted to indemnify the plaintiff against ill consequences flowing from the employment.

Mitcalfe Dale did not reply.

Cur. adv. vult.

May 30. The following judgments were delivered:—

BRETT, M.R. This case was tried before Hawkins, J., without a jury, and the question was as to the plaintiff's right to recover from the defendant money paid in discharge of bets. The

(1) 4 Q. B. D. 685, at p. 687, per Lindley, J.

(2) 15 C. B. (N.S.) 316, at p. 322; 33 L. J. (C.P.) 55, at p. 56.

plaintiff was a turf commission agent, that is to say, he betted for other persons. The learned judge has found many of the questions in dispute as questions of fact, and it seems to have been thought that the Court of Appeal cannot dispute his findings; but the Court of Appeal is not bound by the findings of fact by a judge who tries a case without a jury. As to the transaction itself between the plaintiff and the defendant, it was of a well-known description: the defendant did not bet himself but he hired the plaintiff to bet for him; he gave to the plaintiff authority to pay and to receive money, and it is a contract between principal and agent and not between vendor and purchaser. The contract determines the kind of the employment, and the commission is payable in respect of making bets and not of paying them. One ordinary principle of the law as to principal and agent is that unless a principal is prevented by certain circumstances, the nature of which is familiar to us, he can revoke the authority of the agent. In the present case the defendant had given to the plaintiff authority to pay and receive; but he revoked the authority before payment: can the agent sue the principal? The real question is whether the defendant, as principal, could revoke the authority given to the plaintiff as agent. The evidence given before Hawkins, J., proves that when a member of Tattersall's makes bets and does not pay them if lost, he is liable to be turned out of the room; and if he is turned out, he cannot carry on his business as a turf commission agent. The question is whether the law will imply an undertaking by the defendant, that he will not revoke the plaintiff's authority to pay bets which have been lost. If a principal employs an agent to perform an act, and if upon revocation of the authority the agent will be by law exposed to loss or suffering, the authority cannot be revoked. But in the present case no claim could be lawfully enforced against the agent. It is true that the betting contract was made by the plaintiff in his own name on behalf of his principal; nevertheless, it could not be enforced against him. If the other party to the bet had lost it, and had declined to pay it, he could not have been compelled to do so. But it has been contended that although this view is true, the law puts it into the plaintiff's

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power to enforce payment by the defendant of the amount of the bet, because unless it is paid the plaintiff will suffer a loss in his business; but the plaintiff's business, although it may not be illegal, is directly objected to by the law, and the contracts made by him in his business cannot be enforced: it is a business of which the law ought not to take notice, and therefore the inconvenience and the loss, which the plaintiff may suffer in his objectionable business, form no ground for an action for revoking an authority which the principal ought not to have given. The cases, in which an authority cannot be revoked, ought to be confined to those cases in which the agent will upon revocation suffer what the law deems to be an injury. I think that the judgment of Hawkins, J., was wrong.

BOWEN, L.J. I regret that I cannot agree with the Master of the Rolls, and that I cannot take the same view of this case as he does. The plaintiff was a turf commission agent, and the defendant was a licensed victualler at South Shields. Bets were made by the plaintiff at the defendant's request, and these bets were lost. The plaintiff made the bets in his own name, not in the defendant's; and after the bets had been made and lost, the defendant revoked the authority to pay conferred upon the plaintiff. Had the defendant any right at this eleventh hour to revoke and retract the authority given to the plaintiff? It is true that this is a transaction between a principal and an agent: there is a delegation of power to the agent: there is a mandate to the agent; and, subject to certain exceptions, a principal it is said may revoke a mandate which he has given. But there is something in this transaction beyond a mere mandate given or power delegated to an agent. There is a contract of employment between the principal and the agent, which expressly or by implication regulates their relations; and if as part of this contract the principal has expressly or impliedly bargained not to revoke the authority and to indemnify the agent for acting in the ordinary course of his trade and business, he cannot be allowed to break his contract. What was the contract or bargain? Was the original contract that the plaintiff should be at liberty to make

bets for the defendant, and should be liable at any moment to have the authority conferred upon him withdrawn? Or was it that the defendant employed the plaintiff to make bets and undertook to indemnify him against payment of any bets which he should make on the defendant's behalf? It will not be denied that if a principal employs an agent to do something which by law involves the agent in a legal liability, the principal cannot draw back and leave the agent to bear the liability at his own expense. That is not the case here, because the payment of bets cannot be enforced by law; but by the usage of his business known to both parties at the time of the employment, and with reference to which usage the contract of employment was made, the betting agent became liable as a matter of business to make good a lost bet at the risk of losing his character and customers; and in the present case Hawkins, J., has found, in accordance with the evidence, that the plaintiff would have suffered very serious pecuniary inconvenience if he had failed to pay the bets which had been lost. Was the defendant entitled to turn round and tell the plaintiff not to pay the bets, and to thus put him into the position of being expelled from the room where he carries on his business? What is the inference of fact to be drawn as to the true bargain between them? Can it be said that the plaintiff took upon himself the risk of embarking upon this perilous adventure without such an indemnity? As an inference of fact, it seems to me that it was well understood to be part of the bargain that the principal should recoup his agent, and should not revoke the authority to pay, but should indemnify the agent against all payments made in the regular course of business. I feel the force of the point that the obligation to pay a lost bet relied upon by the plaintiff is not recognised by law; but the plaintiff has placed himself in a position of pecuniary difficulty at the defendant's request, who impliedly contracted, I think, to indemnify him from the consequences which would ensue in the ordinary course of his business from the step which he had taken. There is a great deal of apparent difficulty in this case, because the action relates to betting and wagering; but the contract sued on by the plaintiff is not a wagering contract. I feel great reluctance to differ from the Master of the Rolls, but on the

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whole I am of opinion that the judgment of Hawkins, J., was right and ought to be affirmed.

FRY, L.J. In this case I agree with Bowen, L.J. I confine myself to expressing my concurrence with the views which he has expressed at length. I adopt his views as my own.

Judgment affirmed.

Solicitor for plaintiff: *T. R. Apps.*

Solicitors for defendant: *J. E. & H. Scott, for T. T. Dale, South Shields.*

J. E. H.

July 31.

[IN THE COURT OF APPEAL.]

WELDON *v.* WINSLOW.

Husband and Wife—Married Woman, Right of, to sue alone—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *subs.* 2—*Cause of Action before Act.*

A married woman may, by virtue of the Married Women's Property Act, 1882, sue alone for a tort committed before that Act came into operation.

THIS was an appeal by the defendant from the judgment of a Divisional Court reversing the nonsuit of the plaintiff by Huddleston, B.

The plaintiff, who was a married woman married before the passing of the Married Women's Property Act, 1882, sued the defendant, who was the manager of a licensed lunatic asylum, for assault and libel. The act complained of was an assault committed and the alleged libel was published before the commencement of the Married Women's Property Act, 1882. (1) The defendant justified the grievances complained of (which, except a letter to

(1) By s. 1, subs. 2 of the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, which came into operation on the 1st of January, 1883, "a married woman shall be capable . . . of suing and being sued either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her, and any damages or costs recovered by her in any such action or proceeding shall be her separate property . . ."

a medical journal, were preliminary to a proposed confinement of the plaintiff as a lunatic in the defendant's lunatic asylum) on the ground that, with the exception of the letter, they were authorized by the Lunacy Acts and by the instructions of the plaintiff's husband, and that the letter was privileged. Huddleston, B., nonsuited the plaintiff on the ground that this justification was sufficient, but the Divisional Court (Manisty and Williams, JJ.) reversed that judgment, and ordered a new trial. The point, that the plaintiff could not sue alone, was not taken on behalf of the defendant either before Huddleston, B., or before the Divisional Court.

July 29. *Anderson* (*Edward Clarke, Q.C.*, with him), for the defendant. The plaintiff, being a married woman, cannot sue for what occurred before the commencement of the Married Women's Property Act, 1882. Apart from that Act any damages recovered would be the property of the husband, who was at common law a necessary party to any action to recover them. This is a point of substance, inasmuch as the plaintiff is seeking in her own name to recover damages, which if recovered would belong to her husband. In order to maintain the action, she would have to shew a separate cause of action in respect of her separate estate: *Summers* v. *City Bank.* (1)

It is admitted that *Severance* v. *Civil Service Supply Association* (2) and *James* v. *Barraud* (3) are authorities in favour of the plaintiff; but in *Weldon* v. *Riviere* (4) this very point was decided against her. The 22nd section of the Act of 1882, which saves any right acquired while the Acts of 1870 and 1874 were in force, and any right of any husband or wife under those Acts, shews clearly that the Act of 1882 is not retrospective.

[He also referred to *Werderman* v. *Société Générale d'Electricité* (5); *In re March* (6); *Beckham* v. *Drake* (7); *Lynch* v. *Knight* (8); *Richbell* v. *Alexander* (9); *Ramsden* v. *Brearley* (10);

(1) Law Rep. 9 C. P. 580.
(2) 48 L. T. (N.S.) 485.
(3) 49 L. T. (N.S.) 300.
(4) W. N. (June 28, 1884).
(5) 19 Ch. D. 246.
(6) 24 Ch. D. 222.
(7) 2 H. L. C. 579.
(8) 9 H. L. C. 577.
(9) 10 C. B. (N.S.) 324; 30 L. J. (C.P.) 268.
(10) Law Rep. 10 Q. B. 147.

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Co. Litt. 351 a; Sheppard's Touchstone, tit. "Release," at p. 333; Order XXI., rule 20.]

The plaintiff in person was not heard. (1)

Cur. adv. vult.

July 31. The following judgments were delivered:—

BRETT, M.R. The question which we have to decide is this: assuming that the jury will be justified in finding that the defendant committed the wrongful acts which the plaintiff charges against him, can she maintain this action without joining her husband as a plaintiff? I am of opinion that she can. She is suing for personal injury to herself. For such a cause of action no action could ever have been brought by the husband alone without joining his wife as a plaintiff.

What is done to her is the cause of action, and under the old practice she might have sued in her own name, without joining her husband, and could have recovered, if the defendant did not plead her coverture in abatement, for he could not plead it in bar of the action. The injury to the wife was the meritorious cause of action, and if she had died before the commencement of the action the husband would not have been entitled to sue. If damages should be given, they would belong in the first place to the wife alone, and if they should not be reduced into possession by the husband and he should die, the damages would be hers, and would not go to his executors. It seems to me that according to the law of England the action was always the action of the wife, subject to the right on the part of the defendant of insisting on having the husband joined. The question now turns on the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, and it is this, whether that clause entitles the wife to sue alone, and makes the damages, when recovered, her separate property. The section deals with an action of tort, amongst others, and says that "a married woman shall be capable . . . . of suing and

(1) Upon the question whether the justification was sufficient, the Court gave judgment for the plaintiff, and ordered a new trial subject to the question whether the plaintiff was entitled to sue, as to which they took time to consider whether or not the plaintiff should be called upon.

and being sued . . . . in tort . . . . in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff . . . . or be made a party to any action . . . . brought by . . . . her, and any damages or costs recovered by her in any such action . . . . shall be her separate property." Therefore the section deals with an action for tort, and says that after the Act comes into operation a married woman may bring such an action in her own name without joining her husband, and the damages and costs recovered shall be her separate property.

Now the action here is for tort, and was brought after the statute came into operation, and according to its grammatical construction the statute says that she shall bring such an action, in which her husband has no right, in her own name, and the damages shall be hers. It is said that this is a retrospective construction, because the cause of action arose before the statute came into operation; but the section does not say anything about cause of action; it deals with bringing the action, and there is nothing in it to limit its provisions to causes of action arising after the statute came into operation. I think, therefore, that an action brought after the statute came into operation is within the plain words of s. 1, and it is necessary to distort the grammatical meaning of the words to arrive at the interpretation proposed by the defendant's counsel. I see no reason why this should be done, and the probable intention of the Act is contrary to such a construction. I am of opinion that by s. 1 alone the action is rightly brought by the plaintiff in her own name, and the damages, if she recovers, will be hers. I can see nothing in s. 22 to alter this interpretation. I reserve my opinion on the question as to whether the damages recovered would be the wife's separate property if the husband were joined as a plaintiff.

BOWEN, L.J. This is an action of tort for injury to a married woman during coverture. Before the Judicature Acts the husband could not sue alone for such a cause of action, and if the wife sued alone the only way in which the defendant could object was by plea in abatement, and if the defendant did not plead in abatement, the coverture was not a substantial bar to the action. When the Judicature Acts came into operation pleas in abate-

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ment were abolished, but this did not deprive the defendant of the right to object that the plaintiff was a married woman; the objection had to be enforced either by a summons to stay proceedings or as a defence on the pleadings, which the plaintiff would have to meet at the trial, and in such a case the Court would amend or not according to what seemed to be just under the circumstances of the case. If this case were not affected by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), the defendant effectually could take this point. But the Married Women's Property Act places a different complexion on the case. Sect. 1, sub-s. 2, alters the position of a married woman, and makes her capable of suing without there being any power on the part of the defendant to insist on her husband being joined. In the present case the cause of action arose before the Act came into force, and it is said that the interpretation which we adopt gives the statute a retrospective operation, and affects the vested right of the husband to be joined as a plaintiff, and to reduce the damages into possession. It is not desirable to affect vested rights, but the words of the section seem to me to alter the capacity of the wife for purposes of procedure rather than to deal with the right of the husband, at least until we come to the provision as to damages, and considering even that provision, I think the words fall rather on the side of the line of statutes dealing with procedure than of statutes affecting vested rights. The Act does not destroy the husband's right, but only relieves the woman from incapacity, and it is to be observed that the damages, which are made separate estate, are not such as are recovered by the husband and wife jointly, but are only the damages recovered "*in any such action*," that is, in an action brought by her as if she were a feme sole. The effect is only to destroy the disability of the wife for the purpose of procedure, and it is not at variance with any canons of construction to say that she can now sue alone. I am, therefore, of opinion that she can sue, and that this appeal fails.

FRY, L.J. I take the same view as the other members of the Court; though I am not insensible to the difficulty of holding that the Act has made damages which before the Act might have

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been reduced into possession by the husband the separate property of the wife. But the words of the Act are too plain, and there is nothing to confine their operation to actions for torts committed after the Act came into operation. It was pressed upon us that s. 22 saved the rights of the husband, but it appears to me that the object of s. 22 is to save rights acquired under the Married Women's Property Acts, 1870 and 1874; and it does not extend to the rights of the husband which existed independently of those Acts. I am of opinion that the case is within s. 1, sub-s. 2, and that therefore the plaintiff is entitled to sue alone.

Appeal dismissed. (1)

Solicitor for defendant: *B. H. Van Tromp.*

J. E. H.

[IN THE COURT OF APPEAL.]

July 31.

HETHERINGTON *v.* GROOME.

Bill of Sale—Agreement to pay upon Demand—Power to seize and sell on Default in such Payment—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, 13.

A bill of sale, given by way of security for payment of money, contained an agreement by the grantor to pay the sum advanced and interest upon demand made in writing, and gave power to the grantee to seize and sell the goods on default in payment on demand in writing:—

Held, that the agreement to pay the money on demand was not an agreement to pay it at a stipulated time in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, and that therefore the bill of sale was void by s. 9 of that Act:

Held, also, by Brett, M.R., and Fry, L.J. (Bowen, L.J., doubting), that the bill of sale was void on the ground that it gave power to sell on default in payment on demand without waiting for five clear days as required by s. 13.

INTERPLEADER.

The defendant in the issue had recovered judgment against one Ramsay, and had taken certain goods in execution. The plaintiff claimed such goods under a bill of sale, by which Ramsay

(1) Reported by J. M. Lely, Esq.

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(therein called the mortgagor) assigned the goods to the plaintiff (called the mortgagee) in consideration of 74*l*. The bill of sale contained the following provisions:

"And the said mortgagor doth hereby agree and declare that he will upon demand made in writing therefor duly pay to the said mortgagee the principal sum of 74*l*., together with interest thereon due. And also that it shall be lawful for the said mortgagee, his executors, administrators, and assigns, to enter the premises where the said furniture, chattels, and effects may be, and to seize and take possession thereof, and to sell the same or any part thereof, if the said mortgagor shall make default in payment of the aforesaid principal sum and interest on demand in writing made therefor as aforesaid."

There was also power to seize and sell in the event of the bankruptcy of the mortgagor, or his suffering the furniture, &c., to be distrained, or fraudulent removal, or non-production of receipts for rent, rates, or taxes, or on the levy of execution against the goods of the mortgagor.

The bill of sale contained a proviso that the furniture, &c., should not be liable to seizure for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882.

At the trial of the issue, Hawkins, J., held that the bill of sale was valid, and gave judgment for the plaintiff.

The defendant appealed.

July 14. *J. E. Palmer* (*D'Almeida* with him), for the defendant. The bill of sale is not in accordance with the statute (1), and

(1) By the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 7: "Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

1. If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, &c. . . ."

Sect. 9: "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

The form in the schedule contains these words: "And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]."

By s. 13: "All personal chattels seized or of which possession is taken"

therefore is invalid. In the first place it gives power to seize and sell if default is made in payment on demand. That is not "default in payment" . . . . "at the time therein provided for payment," within the meaning of s. 7, nor is there any "stipulated time of payment," and therefore it is not in accordance with the form in the schedule, and is void by s. 9. *In re Williams, Ex parte Pearce* (1) supports this contention, for payment "on demand" is the same thing as payment "forthwith." Secondly, power is given to sell immediately, without waiting the five days required by s. 13.

McCall (*Kemp, Q.C.*, with him), for the plaintiff. It is not necessary that a proviso as to waiting five days should be inserted in the bill of sale. The power to sell is given subject to the provisions of s. 13. The stipulation as to payment on demand is not contrary to s. 7, or to the form in the schedule; it refers to payment at a time which can be made certain. The bill of sale is substantially like the form in the schedule, which is sufficient: *Davis* v. *Burton*. (2)

J. E. Palmer replied.

Cur. adv. vult.

July 31. The judgment of Brett, M.R., and Fry, L.J., was read by

FRY, L.J. The question in the present case turns on the validity of a bill of sale, made on the 29th of March, 1883, by one Ramsay to Hetherington by way of security,—having regard to the Bills of Sale Act of 1882.

The bill of sale in question contained an agreement by the mortgagor that he would upon demand in writing pay to the mortgagee the principal sum of 74*l.* and interest; and, further that it should be lawful for the mortgagee to enter upon the

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. . . . "under or by virtue of any bill of sale" . . . . "shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or taken posesssion of."

(1) 25 Ch. D. 656.

(2) 11 Q. B. D. 537.

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premises where the assigned effects might be and to seize and take possession thereof, and to sell the same, if the mortgagor should make default in payment of the principal and interest on demand in writing, and in certain other contingencies.

The statute of 1882, by s. 7, provides that the assigned chattels shall not be seized or taken possession of by the grantee for any other than certain causes, one of which is default in payment "at the time therein" (i.e. in the bill of sale) "provided for payment"; and the 9th section avoids every bill of sale given by way of security unless made in the form in the schedule to the Act; and the form thus given provides for payment by instalments on days named, adding in brackets, "*or whatever else may be the stipulated times or time of payment.*"

Is a payment on demand a payment at a time in the bill of sale provided for or thereby stipulated? The words of the statute and the schedule are perhaps not clear; they may well include a time fixed by reference to any known event; they may perhaps include a time to be ascertained by the happening of some contingency, but they do not in our opinion include a time to be ascertained by nothing but the mere choice and volition of the holder of the bill of sale. To leave the time of payment at his unfettered choice is not, we think, within the meaning of the 7th section of the statute, to provide in the bill of sale a time for payment, or within the meaning of the schedule to ascertain the time by stipulation.

It is impossible not to see that the object of the statute was greatly to fetter the freedom of contract as regards such instruments as that now in question, and we think that to hold a payment on demand to be a payment at a stipulated time would be to go counter to the object and spirit of the legislature as expressed in the Act in question.

There is in our opinion a further objection to this bill of sale. It gives in terms the power to enter, to seize, to take possession, and to sell, in default of payment on demand, or on the happening of certain events therein mentioned, which are the same as the events referred to in sub-ss. 2, 3, 4, and 5 of s. 7 of the Act of 1882. From this provision a person reading the document alone would conclude that all these powers, including the power of sale,

arose forthwith on the happening of any of these contingencies. But the 13th section of the Act prohibits the sale of any chattels seized until the expiration of five clear days from the day of seizure, and no lawyer can doubt but that this provision of the Act would be held to override and alter what would otherwise have been the construction of the instrument.

Now the form of the bill of sale given by the Act contains no affirmative statement of the contingencies on which seizure or sale may be made, and still less any suggestion that a sale can be made immediately on seizure. The form of the bill in question which contains this false suggestion is not, in our opinion, in substantial accordance with the form in the schedule. We think that this false suggestion, though no doubt inoperative in law, is likely to mislead a man of the class by whom bills of sale are often given, and to furnish a weapon of oppression to a man of the kind by whom they are often taken. Moreover, we can find no motive whatever for the insertion in this instrument of the express power of sale except the desire to mislead the grantor. We think that for this reason also the bill of sale is void under the 9th section of the Act of 1882.

BOWEN, L.J. If the validity or invalidity of this bill of sale depended upon all the questions discussed in the judgment which has just been delivered, I should find great difficulty in assenting to the judgment, because I am inclined to think that it is too strict a construction to read the bill of sale as purporting to give the grantee a right to sell otherwise than in strict conformity with the provisions of s. 13 of the Act of 1882. I think that treating the instrument broadly and fairly, while at the same time we are bound to insist that the form shall not be substantially at variance with the form in the schedule to the Act, I should come to the conclusion that the sale was not to take place until after the expiration of the five clear days limited by s. 13. But, whatever may be the correct view as to this, the question becomes unimportant, because this bill of sale gives a power of seizure on default in payment on demand, which is contrary to s. 7, sub-s. 1, and it has not a stipulated time for payment in accordance with the form in the schedule. I have felt considerable

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doubt, but I am not prepared to differ from the other members of the Court, and on the last-mentioned ground I concur in the decision. (1)

Appeal allowed. (2)

Solicitor for plaintiff: *Apps.*

Solicitor for defendant: *T. Durant.*

W. P.

(1884) 13 Q. B. D. 794. ROBERTS v. ROBERTS. | *Distinguished.* ACHESON v. RUSSELL. [1951] 1 Ch. 67

March 26.

[IN THE COURT OF APPEAL.]

ROBERTS AND OTHERS *v.* ROBERTS AND ANOTHER.

Bill of Sale—Consideration, Statement of—Growing Crops—After-acquired Property—"Separately assigned"—"By way of Security"—"Specifically described"—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 4, 7—*Bills of Sale Act* (1878) *Amendment Act,* 1882 (45 *&* 46 *Vict. c.* 43), *ss.* 4, 5, 6, *sub-s.* 1, *ss.* 8, 9, *and sch.*

A bill of sale, duly registered and dated the 30th of April, 1883, and made between one grantor and three grantees, recited that two of the grantees (R. & D.) were liable as sureties for the grantor on a bill of exchange for 60*l.*, which had been discounted at a bank; that two of the grantees (D. & E.) and one O. were liable as sureties for the grantors on a bill of exchange for 100*l.*, which had been discounted at the same bank; that the grantor was unable to meet the said bills, and was also in urgent need for a further sum of 45*l.*, and had applied to the grantees to take up the said two bills of exchange and make him a further advance of 45*l.*, which they had agreed to do in consideration of the grantor entering into the bill of sale, "for the purpose of securing repayment to them with interest as well of the said sum of 45*l.*, as also of the said two bills of 60*l.* and 100*l.* respectively with all expenses due thereon." The bill of sale then witnessed that "in consideration of the sum of 45*l.* now paid to the said" grantor "by the said grantees (the receipt whereof the said" grantor "hereby acknowledges), and of the covenant on the part of the grantees hereinafter contained," the grantor covenanted with the grantees on demand to "pay to the grantees all and every the said several sums of 60*l.*, 100*l.*, and 45*l.*, and all costs, charges, and expenses," and meanwhile to pay interest thereon. The bill of sale also witnessed that "in further pursuance of the said agreement and in consideration of the premises," the grantor assigned unto the grantees "all the crops now growing, or which shall at any time hereafter during the continuance of this security be growing in or upon" certain farm-lands in the grantor's occupation, "and also all horses, cattle, carts, carriages, implements of husbandry, farming machinery, tools, utensils, hay, straw, consumable stores, live and dead

(1) See *Melville* v. *Stringer*, ante, p. 392.

(2) Reported by P. B. Hutchins, Esq.

stock, furniture, and household effects, which now are, or at any time hereafter during the continuance of this security shall be, in, upon, or about the same farm, or the farmhouse, barns, stables, or other buildings or erections thereon; and all which said crops, stock, implements, furniture, and effects are intended to be specifically described in the schedule hereunder written (but the said schedule is not to abridge the other words of description contained in these presents"). The bill of sale contained many covenants by the grantor, but none by the grantees. It did not contain the phrase "by way of security" amongst the operative words. The schedule to the bill of sale contained a list of live stock, and the words "household furniture and effects," without any list or inventory thereof, and also under the heading "crops" a list of fields with their names, acreage, and the nature of the crops growing thereon. The instruments described as "bills of exchange" were, in truth, promissory notes, and had not been discounted. The goods and chattels comprised in the bill of sale were seized on behalf of execution creditors of the grantor, and an interpleader issue was directed between the grantees and the execution creditors, but no after-acquired property was seized on behalf of the execution creditors:—

Held, that the bill of sale was valid under the Bills of Sale Act (1878) Amendment Act, 1882, except as to after-acquired property and the household furniture and effects; for the consideration was stated with sufficient accuracy, and "was truly set forth" within the meaning of s. 8, notwithstanding the misdescription of the promissory notes, and that the agreement to take up the bills recited in the deed was in effect a covenant to take up the promissory notes; that the grant of the after-acquired property did not invalidate the grant of the existing property; that the growing crops were separately assigned within the true meaning of the statute; that the omission of the words "by way of security" was rectified by the other terms of the deed; that in the schedule the chattels, except the "household furniture and effects," were "specifically described" within the meaning of s. 4; but that the bill of sale was void as against execution creditors of the grantor in respect of any property afterwards acquired by the grantor, and also as to the household furniture and effects because they were not specifically described within the meaning of s. 4.

INTERPLEADER ISSUE tried by Stephen, J., without a jury.

The defendants in the issue were the executors of the will of John Williams, who died on the 30th of December, 1882. John Williams was the father-in-law of Thomas Davies, to whom he was at the time of his death creditor for about the sum of 300*l.*, secured by the promissory note of Thomas Davies; and in March, 1883, the defendants, as executors of Williams, demanded from Thomas Davies the amount due to their testator's estate. In April, Thomas Davies, being in difficulties, agreed with the plaintiffs in the interpleader issue, Evan Roberts, Henry Davies, and Edward Edwards, to execute a bill of sale in their favour. Evan Roberts and Henry Davies were then liable as sureties for

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Thomas Davies on a promissory note for 60*l.* at three months, and Henry Davies, Edward Edwards, and one Edward Owen, were then liable as sureties for Thomas Davies on a promissory note for 100*l.* at three months. Neither of these promissory notes had been discounted, and they remained in the hands of the payees. Thomas Davies was a farmer, and the bill of sale comprised his live and dead stock, household furniture and effects, and growing crops, upon his farm either at the time of the execution of the bill of sale or at any time thereafter "during the continuance of this security." It was dated the 30th of April, 1883, and was in the terms hereinafter set forth. At the time of its execution the grantees were aware that Thomas Davies was indebted to the defendants as executors. On Thomas Davies having failed to pay the sum due to the defendants as executors of Williams, they issued a writ of summons against him on the 13th of September and obtained judgment for default of appearance. On the 27th of September a man was put into possession of the goods comprised in the bill of sale on behalf of the grantees; some of the goods were sold by auction, and after deducting 47*l.* 18*s.* for expenses of the sale, a sum of 95*l.* 14*s.* 2*d.* was paid to the grantees. The farming stock was bought in by the family of Thomas Davies at the sale on behalf of the grantees, and was afterwards seized and sold by the sheriff under a writ of fi. fa. issued upon the judgment by default obtained by the defendants against Thomas Davies. The chattels seized having been claimed by the grantees of the bill of sale, the present interpleader issue was directed, and the sheriff paid into court 194*l.* 5*s.* 5*d.* to abide its event. The bill of sale was in the following terms:

"This indenture, made this 30th day of April, 1883, between Thomas Davies, of Llewesog-Issa, in the parish of Llanrhaidr-yn-Cinmerch, farmer, of the one part, and Evan Roberts, of Llwyn Issa, in the parish of Derwen, farmer, Henry Davies, of Bryngwyn, in the parish of Clocaenog, farmer, and Edward Edwards, of Nantclwyd Ucha, in the parish of Llanelidan, farmer (hereinafter collectively referred to as the said grantees), of the other part: Whereas the said Evan Roberts and Henry Davies have become and are now liable as sureties for the said Thomas Davies on a bill of exchange at three months for 60*l.*, which has been

discounted at the Ruthin branch of the London Provincial Bank, Limited, and the said Henry Davies, Edward Edwards, and one Edward Owen, have also become and now are liable as sureties for the said Thomas Davies on a bill of exchange at three months for 100*l.*, which has likewise been discounted at the said bank: And whereas the said Thomas Davies is unable to meet the said bills, and is also in urgent need for a further sum of 45*l.*, and he has therefore applied to the said grantees to take up the said two bills of exchange on which they are respectively liable, and also jointly to make him a further advance of 45*l.*, which they have agreed to do in consideration of the said Thomas Davies entering into these presents for the purpose of securing repayment to them with interest as well of the said sum of 45*l.*, as also of the said two bills of 60*l.* and 100*l.* respectively, with all expenses due thereon. Now this indenture witnesseth that in consideration of the sum of 45*l.* now paid to the said Thomas Davies by the said grantees (the receipt whereof the said Thomas Davies hereby acknowledges), and of the covenant on the part of the grantees hereinafter contained, the said Thomas Davies doth hereby covenant with the said grantees, jointly and severally, that he, the said Thomas Davies, his heirs, executors or administrators, will on demand of the said grantees or any of them, or any of their executors or administrators, made by notice in writing served upon him or them or left upon the hereditaments upon which any portion of the chattels hereby assigned shall for the time being happen to be requiring payment thereof, pay to the grantees all and every the said several sums of 60*l.*, 100*l.*, and 45*l.*, and all costs, charges and expenses which they or he may respectively incur, sustain, or be put to by reason or in consequence of their having paid the said bills of exchange or either of them, or otherwise in respect of the premises, And until payment of such sum or sums respectively will pay to the grantees interest thereon respectively, or on so much thereof respectively as shall for the time being remain unpaid, at the rate of 6*l.* per cent. per annum from the time or respective times of the same being paid, incurred or sustained by the grantees or any of them by equal half-yearly payments on the day of and the day of in every year, or on the day of the payment of the said principal sum or sums, as

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the case may be. And this indenture also witnesseth that in further pursuance of the said agreement and in consideration of the premises, the said Thomas Davies, as beneficial owner, doth surely convey and assign unto the said grantees all the crops now growing or which shall at any time hereafter during the continuance of this security be growing in or upon the farm lands and premises called Llewesog Issa aforesaid, and now in the occupation of the said Thomas Davies. And also all horses, cattle, carts, carriages, implements of husbandry, farming machinery, tools, utensils, hay, straw, consumable stores, live and dead stock, furniture and household effects, which now are or at any time hereafter during the continuance of this security shall be in, upon, or about the same farm or the farmhouse, barns, stables, or other buildings or erections thereon, and all which said crops, stock, implements, furniture and effects, are intended to be specifically described in the schedule hereunder written (but the said schedule is not to abridge the other words of description contained in these presents). And the said Thomas Davies doth hereby covenant with the said grantees, jointly and severally, that he will at all times during the continuance of this security insure and keep the said chattels and things hereby assigned insured against loss or damage by fire in the sum of 200*l.* at the least in the names of the grantees, who shall apply the moneys to be recovered by virtue of any such insurance in carrying out the true intent and meaning of these presents. And also will punctually pay all rents, rates and taxes now due or to become due and payable in respect of the premises on which the said chattels and things, or any of them, are or shall be. And will upon demand in writing by the said grantees, or any of them, produce to them or him the last receipts for rent, rates and taxes of him, the said Thomas Davies. And that he, the said Thomas Davies, will not sell or remove any of the said chattels and things from the farm or farmhouse without the previous consent in writing of the said grantees, their executors, administrators, or assigns. Provided always that the chattels and effects hereby assigned shall be liable to be seized or taken possession of by the said grantees upon the happening of any of the events specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882. Provided also that on

or at any time after the expiration of the time mentioned in the 13th section of the said Act the said grantees may sell the said chattels and effects, or any part thereof, either by public auction or private contract. In witness, &c.

"The schedule above referred to:

"2 cart horses, 2 cart mares, 1 pony, 2 colts, 7 milking cows, 1 bull, 9 yearlings, 4 calves, 2 sows, 5 store pigs. Household furniture and effects. Implements of husbandry."

The schedule contained also, under the heading "crops," a list of fields with the names stated in Welsh, the acreage of the fields and the nature of the crops growing therein being set forth.

The bill of sale was executed by Thomas Davies, and his execution was attested, and the bill of sale was duly registered. All the goods and chattels seized by the sheriff under the writ of fi. fa. were upon the farm at the time of the execution of the bill of sale, and there was no after-acquired property of any kind. The value of the household furniture and effects comprised in it was about 40*l.*

At the trial Stephen, J., was of opinion that the bill of sale was valid, and gave a verdict and judgment for the plaintiffs in the issue. The defendants appealed.

March 19, 26. *Swetenham, Q.C.*, and *Clement Higgins*, for the defendants. It is not disputed on behalf of the defendants that the bill of sale has been properly registered under the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43); but it is void, because it does not comply with the provisions of that statute. The bill of sale was intended to secure to the grantees the sum of 205*l.*, namely, 60*l.* and 100*l.*, the amounts of the two promissory notes, and 45*l.* actually advanced; and of this sum of 205*l.* they have received back 95*l.* 14*s.* 2*d.* which leaves 109*l.* 5*s.* 10*d.* alleged by them to be due to them. But for the following reasons the bill of sale cannot be treated as a valid security.

First, the consideration is not "truly set forth" within the meaning of the Bills of Sale Act (1878) Amendment Act, 1882. The instruments upon which Thomas Davies and his sureties were liable, were promissory notes; they had not been discounted,

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and had not then left the hands of the payees. But in the recitals they are described as bills of exchange and it is averred that they had been discounted at a certain bank which is named. Then it was part of the consideration that a covenant by the grantees should be inserted in the body of the deed: but although it contains many covenants by the grantor, the covenant by the grantees, for which the grantor must be assumed to have stipulated, is wholly omitted. It is admitted for the defendants in the issue that the two sums of 60*l.* and 100*l.* were actually due; but the consideration is not set forth with sufficient accuracy so as to be a true statement, it is set forth imperfectly and opens the door to fraud. Upon the face of the bill the only consideration for the conveyance to the grantees is the sum of 45*l.*, the intended covenant by them having been omitted: this is not a small inaccuracy, and the bill of sale is rendered void by the untrue statement of the consideration; an accurate statement is imperative; although there may be no intention to deceive or to commit a fraud, a bill of sale will be invalid whenever the consideration is imperfectly stated.

Then the bill of sale is void as against the execution creditors, at least as to the growing crops; they are not separately assigned. By the Bills of Sale Act, 1878, s. 4, growing crops assigned apart from any interest in the land are protected when the bill of sale separately assigns them; but by s. 7 they are not to be deemed to be separately assigned, merely if they are assigned by separate words, and the Bills of Sale Act (1878) Amendment Act, 1882, s. 6, sub-s. 1, must receive a similar construction. In the present case, the growing crops are assigned together with the other goods and chattels of the grantor, and not being "separately assigned" within the meaning of the statute, they are not protected from seizure and sale by the sheriff. Then the bill of sale purports to convey after-acquired property contrary to the provisions of the Bills of Sale Act (1878) Amendment Act, 1882, s. 5; it is rendered void by that enactment not only as to the after-acquired property, but also as to all existing chattels comprised in it. Further, the bill of sale does not follow the form set out in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, it does not state that the chattels are assigned "by way of

security," and in the operative part the language used is that of an absolute assignment. The bill of sale ought to have substantially followed the form in the schedule, as is pointed out by Brett, M.R., in *Davis* v. *Burton* (1), and as it does not, it is void altogether: *Brocklehurst* v. *Railway Printing and Publishing Co.* (2) By s. 4 of the statute last-mentioned, the schedule of a bill of sale must contain an inventory specifically describing the goods contained in it; the schedule mentions "household furniture and effects;" but there is no inventory and there is no specific description of them. The bill of sale, therefore, is void upon this ground.

Then the bill of sale was fraudulent; the grantor owed 300*l.* to the executors of Williams, and it was made in April after they had demanded payment of the debt due to them: the grantees were aware that Thomas Davies was indebted to the executors. The bill of sale was a fraudulent transaction between the grantor and the grantees; but it is difficult to give direct evidence of the fraud, for that could be obtained only by admissions of the grantor and grantees.

F. Marshall, for the plaintiffs in the interpleader issue, was not called upon as to the question of fraud, and was stopped as to the question whether the consideration was truly set forth.

The bill of sale is substantially in the form given in the schedule of the Bills of Sale Act (1878) Amendment Act, 1882.

[PER CURIAM: The grant of the after-acquired property is not warranted by the form contained in the schedule, and is contrary to s. 5 of this statute. This is the real difficulty which the plaintiffs in the issue must meet.]

The grant of the after-acquired property is immaterial, and is not inconsistent with a valid grant of the existing chattels: it can be altogether rejected as mere surplusage. Moreover the present bill of sale would have been valid before the passing of the Bills of Sale Act (1878) Amendment Act, 1882, as is plain from *Lazarus* v. *Andrade* (3); and there has been no decision upon that statute shewing that the doctrine laid down in that case is no longer applicable. The chattels comprised in the present bill of sale are

(1) 11 Q. B. D. 537, at p. 540. (2) Weekly Notes, 1884, p. 70.
(3) 5 C. P. D. 318.

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"specifically described" within the meaning of s. 4 of the statute last referred to; for they are mentioned in such terms that they can be easily identified; and this is all that is necessary: *Giles* v. *Melsom.* (1) Any defect in the description in the schedule may be supplied and amended by the language of the bill of sale itself: *Jones* v. *Harris.* (2)

Swetenham, Q.C., in reply.

BRETT, M.R. The question in this case is as to the right to certain goods, which were seized by the sheriff and eventually sold, and after paying what was due to the landlord a sum of about 194*l.* was left. The point to be determined is whether the proceeds of the sale of the goods are to go to the execution-creditors or to the grantees under the bill of sale. At the trial it was urged that all the goods ought to be deemed to belong to the execution-creditors and that the bill of sale was fraudulent; but there was no fraud, and the bill of sale was not invalid on the ground of fraud. Nevertheless it is necessary to consider whether the bill of sale relied upon may not be rendered void by the Bills of Sale Act (1878), Amendment Act, 1882. It has been said that the consideration was not "truly set forth." I agree that "not truly set forth" does not mean "intentionally falsely set forth:" the consideration must be stated with substantial accuracy. The real consideration appears in the present case to have been of this nature: two of the grantees, E. Roberts and H. Davies, were liable upon a promissory note for 60*l.*; but they were sureties only for the grantor, T. Davies, and they had rights against him as the principal debtor for whose behoof they signed; and further two of the grantees, H. Davies and E. Edwards, and also a person named Owen were liable as sureties for the grantor, T. Davies, on a promissory note for 100*l.* Each of these promissory notes created a separate liability, and it is true to say that the parties to them respectively were separately liable thereon. But the question, which of the grantees were liable on the promissory notes, is wholly outside the material stipulations of the bill of sale. There is no substantial difference between a bill of

(1) Law Rep. 6 H. L. C. 24, at p. 29, per Lord Selborne, L.C.
(2) Law Rep. 7 Q. B. 157.

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exchange and a promissory note; although the promissory notes were misdescribed as bills of exchange, they were sufficiently described in the recitals; the periods of time which they had to run, the amounts for which they were made payable, were stated in the recitals. As regarded the two promissory notes, the consideration for executing the bill of sale was that the grantees agreed to take them up. The true state of circumstances is stated in terms, at least substantially: and it is plain from the language of the bill of sale that there was an agreement that the grantees should take them up. Then also a sum of 45*l.* is advanced and a covenant must be implied to take up the promissory notes. The consideration was that the promissory notes should be taken up and that the sum of 45*l.* should be advanced. The consideration is sufficiently and truly described, and the bill of sale states what the consideration really is.

It has been further urged that the bill of sale is void, because the crops mentioned in it are not assigned separately. I think that the bill of sale having been registered, the requirements of the statutes have been complied with as to the growing crops. Then it has been urged that the bill of sale is void because the words "by way of security" are omitted, and it has been urged on this ground that the bill of sale is not in the form required by the statute. I think still that what I said in *Davis* v. *Burton* (1) is correct. There must be a substantial compliance with the form contained in the schedule; if what is added, will make the meaning of the bill of sale different from the form contained in the schedule, it will make the document void; but I think that the bill of sale before us has the same effect as the form in the schedule. It is given "by way of security," that is the true results of its provisions. Then the bill of sale covers all goods properly described in it; but it does not cover goods "not specifically described." The learned judge at the trial thought that any description of species would be sufficient, that is of species as distinguished from genus. That is not the true construction of the Act. The Act was framed for the sake of unfortunate persons, it was framed for the purpose of avoiding mischief. The legislature knew that bills of sale were drawn up

(1) 11 Q. B. D. 537, at p. 540.

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with a general description of the goods therein comprised, and in order to avoid a long inquiry what chattels are covered by a bill of sale, it was enacted that they must be specifically described. I will pause for a moment to consider what "specific description" means. There may be a general description in the body of the bill of sale, and the goods may be specified in a schedule. I think that "specific description" means an inventory. The value of the goods may not be put down in an inventory, but it does not consist of merely one or two items. The statute requires that a proper inventory shall be prepared, and therefore all articles not described as in a proper inventory are not covered by the bill of sale. It seems to us that this point was not properly sifted at the trial. We think that the "household furniture and effects" are not "specifically described" within the meaning of the statute, and that the execution-creditors are entitled to the proceeds of the sale thereof. The grantees of the bill of sale will take so much of the remaining proceeds as will satisfy what is due to them.

LINDLEY, L.J. The charge of fraud was not established, and I need say no more about this point.

Then is the bill of sale valid under the provisions of the Bills of Sale Act (1878) Amendment Act, 1882? It is required by s. 8 of that statute that a bill of sale "shall truly set forth the consideration for which it was given," and it has been contended before us that the bill of sale now in question is void, because the consideration is not truly set forth. In the first testatum the consideration is stated to be "the sum of 45*l.* now paid to the said Thomas Davies by the said grantees, (the receipt whereof the said Thomas Davies hereby acknowledges,)" and also "the covenant on the part of the grantees hereinafter contained." In the second testatum the grant is said to be "in further pursuance of the said agreement and in consideration of the premises." By these words we are thrown back upon the recitals. Two errors occur in the deed; the instruments mentioned in the recital are described as "bills of exchange," whereas in truth they were "promissory notes." I think that this mis-description, and also the mis-statement as to the discounting are immaterial: the consideration is not untruly stated in this respect.

Then it has been urged that the grant of the chattels was made partly in consideration "of the covenant on the part of the grantees hereinafter contained," and that as no covenant by the grantees is contained in the subsequent part of the deed, the consideration is imperfect and also imperfectly stated. But it is apparent on the face of the deed that the covenant intended to be afterwards inserted related to the taking up of the promissory notes alluded to in the recitals; and the omission to put in the covenant by the grantees is corrected by the very terms of the deed itself. The statement as to the agreement amounted to a covenant.

Then, it has been argued that the bill of sale is void under s. 9, because it is not in accordance with the form given in the schedule to the statute: it does not contain the words "by way of security," but the recitals and the consideration shew that the bill of sale was made by way of security. If it had been intended to execute an absolute conveyance, different language would have been used. The omission of the words "by way of security" is not a fatal defect.

Then it has been contended that as the bill of sale purports to deal with after-acquired property, it is by force of s. 4 void altogether; but under that section a bill of sale dealing with after-acquired property is good as against the grantor; and a bill of sale may be void for some purposes and good for others; it may be void as between execution-creditors and the grantee, and good as between the grantor and the grantee: to hold otherwise would be to defeat the operation of s. 4. The bill of sale, therefore, is good as against the grantor: and I think that upon similar grounds the bill of sale is good against the execution-creditors as to existing property, although it is void against them as to after-acquired property.

These reasons, however, do not dispose of all the objections made to the bill of sale.

It has further been urged that the bill of sale is void because the growing crops are not separately assigned; but this objection arises from a misapprehension of the intention and of the language of the legislature. Upon reference to the Bills of Sale Act, 1878, ss. 4, 7, it is plain that a bill of sale must be

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registered in respect of growing crops only when they are assigned "separately," that is, apart from any interest in the land; and ss. 4, 5, and 6, sub-s. 1, of the Bills of Sale Act (1878) Amendment Act, 1882, must receive a similar construction. Here the growing crops are assigned apart from any interest in the land, and therefore they fall within the statutory provisions requiring registration. But the bill of sale has been registered, and it seems that the assignment of the crops is valid within the sections of the statutes which I have mentioned, although the crops are not assigned separately from the other goods.

Then it is urged that the chattels are not "specifically described" in the schedule within the meaning of s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882. The question is whether there is a specific description. At the trial the learned judge thought there was a specific description. But upon referring to s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882, it is plain that to every bill of sale must be annexed not only a schedule but also an inventory; and the description "household furniture and effects" is not an inventory of them. It is enacted in s. 4 that every bill of sale "shall have effect only in respect of the personal chattels specifically described in the said schedule." What specific description is sufficient? A mere general description is not enough: there must be an inventory describing the chattels as business men would describe them: without going into minutiæ, it seems to me that it would be sufficient to state the nature of the articles and the number of them, for instance, twenty chairs, five tables. But "household furniture and effects" is clearly insufficient; these terms are not a specific description.

The bill of sale before us is good as to the greater part of the chattels comprised in it, but it is void as regards the household furniture and effects. The proceeds of the sale, excluding the furniture and effects, are sufficient to pay what is due to the grantees of the bill of sale. Consequently there must be a verdict for the plaintiffs, the grantees of the bill of sale, for 109*l.* 5*s.* 10*d.*; the defendants will take the rest, and there must be a verdict for them as to the residue. The plaintiffs, as claimants of the goods, were substantially right at the trial; they are entitled to be paid in full; and the appeal was brought to deprive them of

what was theirs; the defendants have succeeded in shewing merely that a small part of the goods comprised in the bill of sale was liable to be seized and sold by the sheriff for their benefit; they have failed substantially as to the appeal, and the plaintiffs are entitled to costs throughout.

Appeal dismissed.

Solicitors for plaintiffs: *F. Venn & Co., for W. Morris & Jones, Liverpool.*

Solicitors for defendants: *Ullithorne, Currey, & Co.*

J. E. H.

[IN THE COURT OF APPEAL.]

April 2

WALMSLEY *v.* MUNDY.

Practice—Receiver—Question of Title—Reference to Master—Appeal—Supreme Court of Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7, *s.* 25 *sub-s.* 8.

The plaintiff, having obtained judgment, was by an order made at chambers appointed receiver of the rents of some houses belonging to the defendant; the order was made without prejudice to prior incumbrances. G. having applied to discharge the order appointing the receiver on the ground that he was a second mortgagee under a deed executed by the defendant before the judgment in the action, the Queen's Bench Division referred the question as to the validity of G.'s mortgage to a master, who after hearing evidence reported that the mortgage was a sham and had been executed in order to defeat the defendant's creditors. The Queen's Bench Division declined to review the evidence upon which the master had acted, accepted his report as conclusive, and refused G.'s application:—

Held, that inasmuch as the receiver was appointed under an equitable jurisdiction now vested in the Queen's Bench Division, the evidence before the master might have been reviewed; and the Court of Appeal being of opinion on the evidence that the mortgage had been executed in good faith, discharged the order made at chambers, whereby the plaintiff was appointed receiver.

On the 21st of March, 1883, the plaintiff issued a writ against the defendant, Mundy, for the sum of 186*l.* 2*s.* 4*d.*, for goods sold and delivered by the plaintiff to the defendant in the ordinary course of trade. On the 22nd of March, 1883, the defendant, Mundy, executed a second mortgage on the hereditaments 2A and 3, Scylla Road, Peckham, in the county of Surrey,

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to E. W. Goodenough, to secure all moneys owing or thereafter to become owing from Mundy to Goodenough. On the 30th of March, 1883, the plaintiff, Walmsley, obtained judgment against the defendant Mundy, in default of appearance. On the 31st of March, 1883, the plaintiff obtained ex parte a receivership order over the hereditaments, 2A and 3, Scylla Road, and was himself appointed receiver of the rents of the same without giving security. The appointment was made without prejudice to the rights of any prior incumbrancers who might think proper to take possession of the hereditaments, and the receiver was directed to keep down the interest. This order was made by North, J. On the 25th of June, 1883, a summons was taken out before the judge in chambers to discharge or vary the order of North, J., appointing the receiver. This summons was adjourned, and on the 6th of July, 1883, was referred by Williams, J., to the Court. On the 7th of August, 1883, the summons came on for hearing before the Queen's Bench Division, and by an order of that date all questions raised by the summons and the affidavits filed in respect thereof were referred to a master with the following addition, "including the validity of E.W. Goodenough's mortgage and the amount due thereon." On the 8th of January, 1884, the master reported to the Court in the following terms:—

"The case came before me, when Mr. R. G. Glenn appeared as counsel for Goodenough, the claimant, and Walmsley's (the plaintiff's) solicitor for him. In addition to the affidavits mentioned in the order which were read, seven witnesses were examined, and certain books, documents, correspondence, and accounts were adduced in evidence in support of the claimant's case. The hearing took place on five separate days, and occupied nearly eighteen hours. The first question raised was as to the validity of the mortgage mentioned in the order . . . . and the amount due thereon, Goodenough and the defendant Mundy being parties to this deed. Having heard the evidence and the legal representatives of the parties, I found and now report to the Court that at the time of the execution of the said mortgage there was no debt due from the said Mundy to the said Goodenough, and that there was not nor is anything due on the said mortgage, and that the execution thereof was a mere colourable transaction with

intent to defeat the creditors of Mundy and is void. Having come to this decision, which I intimated to the parties, and being of opinion that this disposed of all questions in the case in favour of Walmsley, as appeared by the evidence, I refused to proceed further with the case, unless a reasonable statement of the case on the part of the claimant were opened by his counsel as intended to be proved to the contrary and in support of any other question independent of the mortgage. This I did to save expense. But the claimant's counsel altogether failed to state any case. And I found, and report to the Court that I find, all questions including that on the mortgage in favour of Walmsley."

On the 23rd of January, Goodenough served notice of motion to the Queen's Bench Division to set aside or vary the master's report, and the motion coming on for hearing on the 26th of February, 1884, the Court refused to enter into the matter and declined to re-open the report, and dismissed the motion with costs and also the summons of the 25th of June, 1883, with costs. Goodenough then appealed against the refusal by the Queen's Bench Division to vary or set aside the master's report. The appeal came on for argument on the 26th of March, 1884, before Brett, M.R. and Lindley, L.J., but after the appeal had been opened, a question arose whether the order of the 7th of August, 1883, made by the Queen's Bench Division and referring the matter to the master, could be supported, and the hearing was adjourned in order that Goodenough might appeal against the order last mentioned. He accordingly entered an appeal against that and also against the order of the Queen's Bench Division of the 26th of February, 1884, dismissing the summons of the 25th of June, 1883, which had been referred to the Court by Williams, J. The appeals against the three orders came on to be heard, and the argument was resumed on

April 2. *Willis, Q.C.*, and *R. G. Glenn* (*Dunham*, with them), for Goodenough. The orders made by the Queen's Bench Division are unsupported by previous authority. The order of the 7th of August, 1883, referring the validity of the mortgage to a master is bad; for the Court was dealing with a question of title, but the matter might have been referred to an official or a special

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referee. At all events, the Queen's Bench Division ought to have considered the evidence upon which the master had acted; according to the practice in Chancery the certificate of a chief clerk may be reviewed by a judge, who will go into the questions of fact, and the practice as to the appointment of receivers being of an equitable nature, the principles of equity ought to be followed.

Warmington, Q.C., and *Bonsey* (*Murphy, Q.C.*, with them), for the plaintiff. It is now too late to question the order of the 7th of August, 1883: the parties have acted upon it, and the master has published his report under its authority. At all events, the order was issued in accordance with the procedure at common law, it was made pursuant to the practice of the Queen's Bench Division. A master holds a very different position from the chief clerk of a judge in the Chancery Division, the report of a master must be treated as a substitute for the materials upon which it is founded: *In re Oxlade.* (1) The report of a master cannot be questioned, no evidence can be adduced to vary its effect: *In re Wright.* (2) That was a case as to disciplinary proceedings against an attorney, and surely a question of title is not more serious than an investigation into the conduct of a solicitor.

[BRETT, M.R. A solicitor is an officer of the court, he is bound by its procedure: the parties before us are mere litigants.]

In *Coulson* v. *Graham* (3) it was said by Lord Ellenborough, C.J., that the report of a master must be taken as equivalent to a conviction even in a case of contempt.

[BRETT, M.R. That was a case as to the ordinary jurisdiction of the Court of King's Bench by the common law; but the procedure as to the appointment of a receiver is founded upon equitable jurisdiction.]

The question as to the validity of the mortgage might have been sent before an official or a special referee, in that event the findings as to the facts might have been questioned; but it was referred to a master, and in accordance with the former practice at common law his report must be accepted as conclusive upon the questions of fact.

(1) 1 C. B. (N.S.) 454, at p. 489.
(2) 12 C. B. (N.S.) 705, at p. 707, per Erle, C.J.
(3) 2 Chit. (Pr. C.) 57.

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Willis, Q.C., in reply. The Queen's Bench Division was asked to hear the evidence laid before the master, in order to ascertain upon what grounds he proceeded: surely he had not an exclusive jurisdiction as to a question of title, and there must be some appeal from his decision. It is only necessary to mention the judgment of Jessel, M.R. in *Salt* v. *Cooper* (1), in order to shew that the order appointing the receiver was rightly made.

BRETT, M.R. This is a question of extreme difficulty, and at one time I thought that it ought to be considered by all the members of this Court; but now I am of opinion that we have gathered everything which it is necessary for us to know, and that it will be sufficient for us to decide the question upon the argument which has been addressed to us.

Judgment having been obtained in the action, the plaintiff was appointed in the chambers of the Queen's Bench Division a receiver of the rents of two houses; but he was to exercise his powers without prejudice to the rights of any prior incumbrancers. Goodenough claimed to be a second mortgagee under an instrument executed by the defendant in the action after the issuing of the writ of summons but before judgment, and he took out a summons before the judge in chambers, because he was not treated by the receiver as a prior incumbrancer. This summons was ultimately referred by Williams, J., to the Queen's Bench Division. The summons came before a Divisional Court, and the judges referred the matter to a master to report to them upon it; the master reported that Goodenough was not a prior incumbrancer, and that the mortgage was a mere sham to defeat the creditors of Mundy, the defendant in the action; in fact, that the deed of mortgage was bad under 13 Eliz. c. 5. When the report came before a Divisional Court, the judges were asked to examine the affidavits and the evidence upon which the master acted. The Divisional Court declined to look at the affidavits or to inquire in any way whether the report of the master was warranted by the evidence; they accepted the report as conclusive, and the summons, which had been referred to the Court, and the motion to vary the report were dismissed. The question before

(1) 16 Ch. D. 544.

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us is whether this procedure was right. In point of fact Goodenough appealed from the orders of the Queen's Bench Division, and we directed an appeal also against the order of the 7th of August, 1883, remitting the matter to the master for his report. What ought to be the course of practice now? Before the Judicature Acts none of the orders applied for could have been made, for no receiver could have been appointed in a court of common law. In equity a summons complaining of a receiver's conduct as to the account, must have been referred to the chief clerk of the judge to whose court the cause was attached; and the chief clerk, acting in pursuance of statutory authority, would have issued a certificate, which might have been varied by the judge. Practically there would have been an appeal from the decision of the chief clerk. The present case must be decided by the practice introduced by the Judicature Acts. The order appointing a receiver was made, because those statutes have invested a judge sitting at chambers with an equitable jurisdiction. In the Court of Chancery a summons to vary or discharge that order would have gone before the same judge, unless he was dead or had resigned his office. But in the Queen's Bench Division the judge sitting at chambers for the time being represents the Court; and the judge at chambers may be different, yet the tribunal and the jurisdiction are the same. The practice in the Queen's Bench and the Chancery Divisions cannot be in all respects identical; and it was perfectly right that the judge at chambers, acting as deputy for the judge who was sitting at chambers when the order appointing the receiver was made, should refer the summons to vary or discharge that order to the Divisional Court. The Court was the same as that in which the order of appointment had been made. The judges have power to act under an equitable jurisdiction; they have no chief clerk; but they have officers who perform duties analogous to those of chief clerk; there are masters; there are official referees; in addition to these officers there are special referees; all these persons are analogous to the chief clerks in equity. In the present case the practice in equity ought to have been followed as nearly as practicable; the judges of the Queen's Bench Division were right in referring the matter to the master to report to them; in effect they called

upon him to issue a certificate as chief clerk. Exception was taken to the master's report. In a proper case further evidence might perhaps have been taken in equity, and at all events the evidence adduced might have been reviewed. Under the Supreme Court of Judicature Act, 1873, s. 56, the Court would have been obliged to hear any exception to a report by a referee. It is contended, however, that the reference to the master was directed under the practice originally existing at Common Law, and the counsel for the plaintiff wholly deny that the accuracy of the report can be brought into question before the Court. The answer is, that the judges of the Queen's Bench Division were exercising not the original jurisdiction existing at common law, but were following the practice existing in equity. Therefore, they ought to have allowed Goodenough to bring before them his exceptions to the accuracy of the master's report. The consequences which would otherwise ensue shew that this ought to be the rule of practice. It is a matter of title which arises in the present case; by a mere accident the question as to the validity of the incumbrance was referred to the master, and was to be determined by him without appeal. This is the effect of the contention for the plaintiff. It seems to me that the judges of the Queen's Bench Division have overlooked the fact that they were dealing with a matter of practice in equity. The affidavits might have been brought again before the Court, and the matter at issue between the parties might have been again discussed. No doubt, there was a difficulty as to the procedure, but it is not insuperable. A similar difficulty might arise with respect to a report by a referee. If the finding by the master is correct, the summons taken out by Goodenough may be discharged; if the report of the master is clearly wrong, an order may be made to set it aside or discharge it; if the question is left in doubt, leave may be given to bring an action. The judges of the Queen's Bench Division ought to have allowed the affidavits, the documents, and the proceedings before the master to be brought before them, and ought to have listened to any arguments with reference to them. We must now allow the objections to the master's report to be argued.

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WALMSLEY v. MUNDY.

BAGGALLAY, L.J. These three appeals raise a very important point of practice.

Judgment was signed in the present action on the 30th of March, 1883, and on the following day the plaintiff was appointed a receiver by an order at chambers made by North, J. The appointment was made without prejudice to prior incumbrances, and the receiver was directed to keep down the interest. The validity of the order in truth depended upon the Judicature Acts; but it gave protection to former incumbrancers. Three months afterwards, a summons was taken out by Goodenough to vary or discharge the order of North J.: in equity that would have been an ordinary mode of proceeding: the summons asked for an inquiry or examination pro interesse suo. The summons came on for hearing before Williams, J., who directed that the summons should be referred to the Queen's Bench Division. It was ordered by the Queen's Bench Division that all questions raised by the summons and affidavits should go before a master. It is a matter of common knowledge that the Queen's Bench Division has been in the habit of referring disputed questions to a master for his report; and the reference was directed in order to ascertain whether the order of North, J. should stand in its existing shape. In equity a judge would have ordered a reference to chambers: a reference to chambers is a reference to the judge sitting in chambers: but preliminary matters are dealt with by his chief clerk, the judge having full power to vary or discharge the certificate of the chief clerk after it has been signed; there is thus an opportunity of reviewing it. In January, 1884, the master reported adversely to Goodenough: he found that no debt, no money was due to Goodenough upon the mortgage: he did not, however, state any of the circumstances of the case. The report of the master would have been liable to review in equity. In courts of common law it has not been the practice to review the report of the master; but it can hardly be argued that there is no power. I should have regretted to hold that no appeal would lie against the report of the master; but I should of course be bound by the weight of existing authority: this, however, is an equitable proceeding; and equitable proceedings must be

adopted as a whole. The judges of the Queen's Bench Division ought themselves to have reviewed the evidence, or at least to have referred the matter back to the master for additional consideration. This was evidently the view taken on behalf of Goodenough, for in February, 1884, two applications came on to be heard in the Queen's Bench Division: this procedure would be correct in equity: but the summons that was referred to the Court, and also the motion to vary or discharge the master's report, were both dismissed with costs. Upon the suggestion of this Court a motion has been made to rescind the order of the Queen's Bench Division, referring the matter to the master: these are the three applications before us. The course, which ought to have been adopted in the Queen's Bench Division, was to deal with the whole matter upon the report of the master or to refer it back to him. I think that as the matter is before us, we ought to deal with it.

LINDLEY, L.J. I am of the same opinion. The case is difficult owing to the change which has taken place in the practice of the court. The orders actually made in the Queen's Bench Division cannot all be right; a mistake has been committed somewhere. The jurisdiction of the Queen's Bench Division to appoint a receiver arises out of the powers conferred by the Judicature Acts. The order for the appointment of a receiver of the rents and profits of the judgment-debtor's houses was perfectly right at the time when it was made, and was in proper form. The learned judge, North, J., who made the order, had had a large experience in equity and was accustomed to orders in this form. The plaintiff was appointed the receiver, and entered into possession of the houses: as he was personally interested, he could not take any steps in the nature of interpleader, if any one was dissatisfied with his appointment. Goodenough applied to the judge in chambers to vary or discharge the order appointing the receiver: he was bound to apply to the Court for relief, since by taking any hostile step he would have been guilty of contempt. The judge referred the matter to the Queen's Bench Division; and that Court, by the order of the 7th of August, 1883, referred the matter to a master for his report. He has reported adversely to the claim of Goodenough. Is it to be said that no appeal lies from his decision?

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Lindley, L.J.

The view of the Queen's Bench Division cannot be right. It struck me as open to question whether there was any authority to make the order of the 7th of August, 1883; and we suggested that the point should be argued: but upon looking into the matter I have come to the conclusion that that order was perfectly right. The Queen's Bench Division has held that a reference to a master must be considered to fall under the old practice at common law: that view was wrong: there was no practice at common law, inasmuch as the power to appoint receivers is new. In the Chancery Division the difficulty does not arise: the practice is clearly stated by Kindersley, V.C. in *Randfield* v. *Randfield*. (1) That was a case as to the lord's right to a fine to be paid upon the admission of a tenant to hold by copy of court-roll, and the learned Vice-Chancellor in giving judgment said: "The first question for consideration is, whether the Court should itself decide the question as to the lord's rights. The only ground upon which the lord is obliged to make the present application is, that a receiver has been appointed; and the Court will not permit the possession of a receiver to be disturbed by any person (although that person may have a good right), but such person must apply to the Court for leave to disturb the receiver's possession. Where such an application as the present is made, the Court may decide the matter in favour of the petitioner, and order the receiver to pay him the proper fine; on the other hand, if the Court considers that the petitioner has no sort of right, then, I apprehend, the Court will not allow him to resort to his legal remedy, but will itself decide the question against him and so prevent his incurring unnecessary expense. The third alternative is, that the Court may consider it right, where there is a doubtful legal question, to give the leave asked for, and absolve the party applying from all contempt of the Court by reason of any such proceedings. In the present case I must consider whether the right is clearly in favour of the lord, or whether it is clearly against the lord, or whether it is a matter open to fair doubt. It appears to me, that the right is clearly against the lord." In the Chancery Division the law, as laid down by the Vice-Chancellor, is familiar: the Vice-Chancellor held that the lord was clearly wrong, and

(1) 1 Dr. & Sm. 310, at p. 314.

thereupon decided the case against him. It was perfectly competent for the Queen's Bench Division itself to decide the matter, and we must take the course which that Court ought to have followed. The appeal against the order of the 7th of August, 1883, must be dismissed; but we will hear the arguments upon the appeals from the two orders dated the 26th of February, 1884.

The appeals from the two orders of the Queen's Bench Division dated respectively the 26th of February, 1884, were then heard upon the merits.

Willis, Q.C. and *Dunham* for Goodenough.

Murphy, Q.C. and *Bonsey* (*Warmington, Q.C.* with them), for the plaintiff.

THE COURT (Brett, M.R., Baggallay and Lindley L.JJ.) were of opinion upon the facts that there was a debt due from the defendant Mundy to Goodenough, and that there was a consideration for the mortgage: they, accordingly allowed the appeals from the two orders of the Queen's Bench Division dated the 26th of February, 1884, and ordered that the plaintiff should withdraw from and deliver possession of 2A and 3 Scylla Road to Goodenough, and that the plaintiff as receiver should pass his accounts and pay the balance to Goodenough.

Solicitor for plaintiff: *A. G. Ditton.*

Solicitors for Goodenough: *Broad & Broad.*

J E. H.

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Aug. 11.

[IN THE COURT OF APPEAL.]

HAINES *v.* GUTHRIE.

Evidence—Hearsay—Pedigree—Proof of Birth—Declaration of Deceased Parent.

The rule which admits hearsay evidence in pedigree cases is confined to the proof of pedigree, and does not apply to proof of the facts which constitute a pedigree, such as birth, death, and marriage, when they have to be proved for other purposes.

Therefore in an action for goods sold, to which the defence was infancy, an affidavit stating the date of the defendant's birth, which had been made by his deceased father in an action to which the plaintiff was not a party, was held inadmissible as evidence of the age of the defendant in support of his defence.

ACTION for the price of certain horses sold and delivered by the plaintiff to the defendant.

Defence (inter alia) that at the time of the alleged sale and delivery of the horses the defendant was an infant under the age of twenty-one years; that the horses were not necessaries, and that he was amply supplied with horses before the time of the alleged sale.

Reply, joining issue on the defence.

At the trial, before Grove, J. and a jury, the plaintiff proved a sale of the horses in question to the defendant about the 6th of May, 1883. The defendant's counsel, in support of the plea of infancy, tendered as evidence an affidavit made by the deceased father of the defendant in an administration suit in the Chancery Division, to which suit the plaintiff was not a party. In the affidavit the deponent stated that the defendant was born "on or about the 20th of May, 1862."

Grove, J., admitted the evidence, and the jury gave a verdict for the defendant on the claim in respect of the horses.

The plaintiff gave notice of motion for a new trial on the ground of improper reception of evidence.

1884, May 29. *H. D. Greene,* for the plaintiff, in support of the motion.

Willis, Q.C., for the defendant. The arguments are sufficiently stated in the judgment in the Queen's Bench Division.

Cur adv. vult.

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July 7. The judgment of the Court (Stephen and Mathew, JJ.) was delivered by

STEPHEN, J. This was an action for the price of certain horses. The defence was infancy, and the verdict was for the defendant. A new trial, or entry of judgment for the plaintiff, was moved for on the ground of the improper reception of evidence in favour of the defendant.

The evidence alleged to have been improperly received was an affidavit made in a Chancery suit, to which the plaintiff was not a party, by the deceased father of the defendant, in which he stated that his son was born "on or about the 20th of May, 1862." There was some other evidence as to the defendant's infancy, but the evidence in question must, we think, have greatly influenced the result of the trial.

The objection to the reception of the evidence was that it is not within any of the exceptions to the general rule excluding hearsay evidence.

The argument in favour of its reception was that the rule which admits hearsay in pedigree cases applies to proof of the facts which constitute a pedigree—birth, death, and marriage—whenever those facts are in issue, whatever may be the purpose for which they are proved. It was also suggested that the case fell within a rule supposed to be laid down by Lord Ellenborough in *Roe* d. *Brune* v. *Rawlings*. (1)

The rule according to which hearsay is admitted in cases of pedigree is first stated by Lord Mansfield in *Goodright* v. *Moss* (2), decided by the Court of King's Bench in 1777. In that case Lord Mansfield said: "Tradition is sufficient in point of pedigree. Circumstances may be proved. For instance, suppose from the hour of one child's birth to the death of its parent it had always been treated as illegitimate, and another introduced and considered as the heir of the family, that would be good evidence. An entry in a father's family bible, an inscription on a tombstone, a pedigree hung up in the family mansion (as the Duke of Buckingham's was), are all good evidence. So the declarations of parents in their lifetime."

The principle upon which the rule depends is stated in *Vowles*

(1) 7 East, 279. (2) 2 Cowp. 591.

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v. *Young* (1), decided in 1806, and in *Whitelocke* v. *Baker* (2), decided shortly afterwards.

In *Vowles* v. *Young* (1) Lord Erskine said: "Courts of law are obliged, in cases of this kind, to depart from the ordinary rules of evidence, as it would be impossible to establish descents according to the strict rules by which contracts are established, and subjects of property regulated; requiring the facts from the mouth of the witness who has the knowledge of them. In cases of pedigree, therefore, recourse is had to a secondary sort of evidence; the best the nature of the subject will admit, establishing the descent from the only sources that can be had."

In *Whitelocke* v. *Baker* (2), Lord Eldon said that statements to be admissible must be made by persons having such a connection with the family that it is natural and likely that they should know and speak the truth, so that the statement might be presumed to be the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position.

Lord Blackburn, in 1880, in *Sturla* v. *Freccia* (3), stated the rule in the same way, and put it on the same principle.

The rules dependent on these principles have been elaborated and subjected to qualifications which need not here be minutely stated. One series of cases has decided the degree of relationship in which a declarant must have stood to a family in order that his declarations may be received in evidence. Another series of cases, of which *Kidney* v. *Cockburn* (4), decided in 1831, and *Shields* v. *Boucher* (5), decided in 1847 by Vice-Chancellor Knight Bruce, are the latest, and have most bearing on the present case, have been concerned with the question what statements may be given in evidence. It was supposed at one time that the bare fact of relationship, as e.g., that A. was son, brother, or cousin to B., was all that might be so proved, and on this ground in *Kidney* v. *Cockburn* (4), Tindal, C.J., in the trial of an issue from Chancery, refused to allow the ages of certain persons to be proved by such evidence. Lord Brougham thought that the evidence was

(1) 13 Ves. jun. 140.
(2) 13 Ves. jun. 511.
(3) 5 App. Cas. at p. 641.
(4) 2 Russ. & My. 167.
(5) 1 De G. & Sm. 40.

improperly rejected, and said that Allan Park, J., and Littledale, J., agreed with him, and sent a case for their opinion to the Court of King's Bench. The matter, however, was compromised.

In *Shields* v. *Boucher* (1) the question arose also in an issue from Chancery, whether a witness who had said that he had heard his father say that his (i.e., the father's) uncle married Miss Hollins, might be further asked, "Did you ever hear him say of where?" This question was disallowed by Wilde, C.J., but Knight Bruce, V.C., in an elaborate judgment, gave his reasons for thinking that it ought to have been admitted. Its principal importance in reference to the present case is that the Vice-Chancellor never once refers to the question of the admissibility of such evidence without introducing into his statement of the rule the expression "in cases of pedigree," or an equivalent. The whole judgment indeed goes upon the assumption that whatever declarations may be admissible, they are admissible in cases of pedigree. For instance, he says (pp. 52-3), "The reasons and grounds upon which births, and times of births, marriages, deaths, legitimacy, illegitimacy, consanguinity generally, are allowed to be proved by hearsay (from proper quarters) in a controversy merely genealogical, &c.;" and similar expressions occur in other parts of the judgment.

These cases shew clearly that in a pedigree case, that is in the case of a purely genealogical controversy, the father's affidavit as to his son's age would have been admissible, though this cannot be said to have been established till 1831, when *Kidney* v. *Cockburn* (2) was decided, if indeed that case can be said to have amounted to a decision; but it is also to be observed that each of these cases was a pedigree case—that is, it was a case in which the controversy between the parties was whether or not a certain line of genealogy could be established. It is also to be observed that the principle of the exception to the rule excluding hearsay, as laid down in the earlier cases, applies to pedigree cases only.

We now proceed to examine such authorities as there are, and they are not many, as to the admissibility of such evidence in cases not relating to pedigree. The earliest in point of time is

(1) 1 De G. & Sm. 40.

(2) 2 Russ. & My. 167.

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Herbert v. *Tuckal* (1) decided in 1663. The whole report is as follows:—"Upon evidence in a trial at bar the question was if one was of full age at the time of his will made by him, and upon evidence it appears that he was born the 14th of February, 1608, and he made his will when he was of the age of twenty-one years within two days, and to prove his nonage, the defendant produced an almanac in which his father had writ the nativity of the devisor, and it was allowed to be strong evidence." This report is so concise that it is practically useless. It leaves it a matter of mere conjecture whether the case was or was not one of pedigree. It is probable from the dates that it was. It was decided in 1663. The will was made in 1608. The testator must have been born and the entry must have been made in 1587.

The next is the case of *Rex* v. *Eriswell* (2), decided in 1790. The question in this case was whether the deposition of a pauper, who had become a lunatic after making it, as to his place of settlement was admissible many years afterwards in support of an order of removal. The Court were equally divided, Grose, J., and Lord Kenyon thinking it inadmissible, and Buller and Ashurst, JJ., thinking it admissible. All the judges agreed that the case was the same as if the party were dead. Buller and Ashurst, JJ., thought the deposition admissible as a judicial act, and they also thought that hearsay was admissible in settlement cases as well as in pedigree cases. Grose, J., and Lord Kenyon thought the deposition was not a judicial act, and they said that, if the case was regarded as one of a declaration, it was within no known exception to the rule which excludes hearsay. "I admit," said Lord Kenyon, "that declarations are received in evidence as to pedigrees. This, however, has always been understood to be an excepted case, and to stand on reasons peculiar to itself." All the judges in this case agreed that, to be admissible as a declaration, a statement must be brought within some recognised exception to the rule excluding hearsay. The question between them was whether there was such an exception in cases of settlement.

The next is the case of *Rex* v. *Erith* (3) decided in 1807. In that case a deceased father's statement that his bastard child was

(1) Sir T. Raym. 84.

(2) 3 T. R. 707.

(3) 8 East, 539.

born at Erith was held to be inadmissible as evidence of the child's birth settlement. Lord Ellenborough said: "The controversy was not, as in a case of pedigree, from what parents the child has derived its birth, but in what place an undisputed birth, derived from known and acknowledged parents, has happened. The point thus stated turns on a single fact, involving no question but of locality, and therefore not falling within the principle of, or governed by the rules applicable to, cases of pedigree, and is to be proved therefore as other facts generally are proved, according to the ordinary course of the common law—that is, by evidence to which the objection of hearsay does not apply." This case comes very near to the one before us. Substitute "time," for "place" and "locality," and every word of Lord Ellenborough's judgment would apply to it. It was a considered judgment of the whole Court of King's Bench and is binding on us.

There are two cases which are directly in point, one of which is identical with the present case, and they would be decisive of the question if we could regard them as entirely satisfactory; but one is a nisi prius case, decided apparently without argument, and the other scarcely amounts to more than the expression of an opinion, and though it is a decided opinion of a most eminent judge, it appears to proceed to some extent on a ground which cannot now be taken.

The first case is a nisi prius decision in 1830, by Allan Park, J.—*Whittuck* v. *Waters*. (1) In that case evidence that one of the cestuis que vie of a lease was said in his family to be dead was rejected on the ground that the case was not one of pedigree.

The other case, *Figg* v. *Wedderburne* (2), is identical with the present case, but it is not conclusive, as it was not decided on the question now before us. The judgment was delivered after consideration by Patteson, J. It states the facts, which were that the infancy of the defendant being pleaded, a letter from his deceased father was given in evidence, which, for a purpose unconnected with the action, stated the precise age of the defendant. Patteson, J., said he considered this evidence so weighty that if it were properly received it ought to have been decisive in favour of the defendant, so that after a verdict for the plaintiff

(1) 4 C. & P. 375.

(2) 11 L. J. Pt. II. (Q.B.) 45.

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a new trial ought to have been granted on the ground that the verdict was perversely contrary to the evidence; and he added: "I confess I have a strong opinion that it was not receivable, but the cases upon this subject are conflicting;" and he goes on to give an account of the case of *Kidney* v. *Cockburn* (1), in which he says Tindal, C.J., rejected such evidence, but in the opinion of the Lord Chancellor (Brougham), and Park and Littledale, JJ., improperly. This account of *Kidney* v. *Cockburn* (1) omits to notice the distinction on which the present question turns. *Kidney* v. *Cockburn* (1) was clearly a pedigree case, as the question was whether two brothers, who were born 140 years before the case was tried, were or were not of the whole blood, and the question was whether the exception admitting hearsay in such cases included hearsay as to the age of deceased persons as well as hearsay as to their relationship. The doubt of Patteson, J., would thus seem to have been whether hearsay as to age was admissible even in pedigree cases. The opinion that it is has in more modern practice prevailed, but the question is whether the exception applies to cases which cannot be called in any sense pedigree cases. The cases referred to all seem to us to shew that it does not.

There is, however, one other case to which considerable importance was attached by the plaintiff, and which it is necessary to notice, as it appears rather to suggest than to lay down a broader principle on this subject than has been recognised elsewhere. This is *Roe* d. *Brune* v. *Rawlings*. (2) In that case the question was, whether a lease had been granted pursuant to the terms of a power which enabled the successive tenants for life under a settlement, to let "at the ancient yearly rent." The first tenant in tail sued in ejectment the lessee of a tenant for life, on the ground that the lease was void because the rent reserved was only 14*s.* a year instead of 14*l.*; and he put in evidence, to prove the amount of the ancient yearly rent, a letter written in 1728 by the steward of an earlier tenant for life, stating, amongst other things, the rent at which the premises in question had been usually let. The letter was indorsed by the tenant for life, to whom it was addressed,—"A particular

(1) 2 Russ. & My. 167. (2) 7 East, 279.

of my estate in Cornwall," and was kept with the title-deeds of the estate. This document was admitted as evidence against the lessee of the later tenant for life and in favour of the tenant in tail. Lord Ellenborough pointed out that, if the tenant for life who made the lease had derived title from the tenant for life who made the indorsement, the case would have been clear, but as this was not so the admissibility of the document was put upon other grounds. One ground stated is that the statement was against the interest of the person who made it, as his interest was to diminish the amount of the ancient rent in order that he might obtain as large a fine as possible; but it seems that the Court were not wholly satisfied with this, as Lord Ellenborough goes on to say:—"Then at this distance of time, with the means of knowledge which he had of the fact, and his interest in declaring it the other way, we think that his declaration is evidence of the fact to go the jury. There are several instances in the books where the declaration of a person having knowledge of a fact, and no interest to falsify it, has been admitted as evidence of it after his death. Thus the written memorandum of a father as to the time when his child was born has been received to prove when the infant would come of age, and that he was in fact under age at the time of making his will. And yet the most that can be said for such evidence is the peculiar means of knowledge of the fact by the father, and the absence of all interest in him, at the time of the memorandum or declaration made, to falsify the truth in respect to it. So an entry of the receipt of ecclesiastical dues in the books of a deceased rector is evidence for his successor, which must also be upon the same ground of an absence of all interest to misstate the fact in the rector making such entry, which could not possibly be evidence for himself. Now this paper might, if it had ever met the eye, have been used adversely to the former tenant for life by whom it was authenticated, and could not have been evidence in his favour: he could not, therefore, have had any undue motive for preserving it. In like manner ancient deeds proved to have been found amongst deeds and evidences of land may be given in evidence, although the execution of them cannot be proved; and the reason given is 'that it is hard to prove ancient things, and the finding them in such a place is a

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presumption they were fairly and honestly obtained and reserved for use, and are free from suspicion of dishonesty.' The paper, therefore, having been found amongst the muniments of the family, accredited by one who could not have used it in his own favour, and preserved by him and by the succeeding tenant for life, against whom it might have been used adversely, we think that it was evidence to be left to the jury of the amount of the ancient rent at the time it bears date."

It was pressed upon us, on the authority of this case, that the declaration of a person having knowledge of a fact, and no interest to falsify it, ought as a rule to be admitted as evidence of it after his death. The context, however, shews that Lord Ellenborough was very far from laying down any such rule. He confines it to "some cases," and none of those which he enumerates meet this case, except possibly *Herbert* v. *Tuckal* (1), upon which we have already remarked that for aught that appears it was a pedigree case. The case of the rector's books is treated as an anomalous rule, the reasons for which have now been forgotten.

The case of title deeds (to which the paper in *Roe* v. *Rawlings* (2) appears to have most affinity) stands on grounds of its own, to which we need not here refer.

The rule suggested to have been laid down by Lord Ellenborough cannot possibly be accepted in its generality, for since *Roe* v. *Rawlings* (2) many cases have been decided which are in complete opposition to it: such—to mention two only amongst many—was *Stobart* v. *Dryden* (3), decided in 1836, which decided that a dying declaration that the declarant had forged a deed sued upon was inadmissible. The second case (which was not mentioned in the argument) closely resembles the case now before us. It is *Sturla* v. *Freccia* (4), decided in 1880 by the House of Lords. In that case the question was as to the place of birth and the age of one Mangini. The report of an official committee called a Giunta, which sat at Genoa, stating that Mangini was in 1790 a native of Quarto, aged about forty-five, was rejected; though, as Lord Selborne said, it was proved to be "an authentic public document of the Genoese Government, to which, so far as

(1) Sir T. Raym. 84.
(2) 7 East, 279.
(3) 1 M. & W. 615.
(4) 5 App. Cas. 623.

the good faith of those who made it is concerned, credit might be justly given."

The only remaining point in the case is the suggestion that the facts which collectively make up pedigree, birth, death, and marriage may be proved by declarations whenever they are in dispute, but this contention cannot prevail. It is enough to say that there is not a shadow of authority for it, and it appears to us that in many cases it would be extremely dangerous to admit such evidence. For instance, suppose the question were whether a girl, made the subject of an offence, was under twelve or under sixteen at the time, a declaration of a deceased parent neither would be, nor as it appears to us ought to be, admissible to prove it.

For all these reasons we are of opinion that the father's affidavit in this case was improperly admitted, and that there must be a new trial. We cannot enter judgment for the plaintiff as there was other evidence of infancy.

W. A.

The defendant appealed.

Aug. 9, 11. *Willis*, Q.C. (*Glyn*, with him), for the defendant. The evidence was rightly admitted. It cannot be disputed that an exception to the rule by which hearsay evidence is rejected exists in cases of pedigree, and the present case comes within this exception, for the fact to prove which the evidence was given, the defendant's birth, is one of the facts which constitute a pedigree. If the whole of a pedigree can be proved by hearsay evidence, it follows that each separate fact in the pedigree can be so proved (1 Phillipps and Arnold on Evidence, 199, 10th ed.). With regard to the admissibility of evidence to prove any fact which is in issue, it is immaterial what the action is brought for. The same reasons for and against the admissibility of the evidence apply in all cases. It is admitted that if the father had been alive, and sane, so that he could have been called, no previous statement made by him could have been received, but after his death his solemn statement on oath was probably the best evidence that could have been obtained of the date of his son's birth. From his position he would have exceptional means of knowledge, and nothing can be suggested to shew any probability that his statement would not be true.

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[In addition to the cases which are dealt with in the judgment of the Divisional Court, the following were cited: *Vulliamy* v. *Huskisson* (1); *Plant* v. *Taylor* (2).]

Lumley Smith, Q.C., and *H. D. Greene*, for the plaintiff, were not called upon.

BRETT, M.R. This action was brought to recover the price of certain horses sold by the plaintiff to the defendant, and the defence, which raises the question to be decided on this appeal, is that at the time of the sale the defendant was under the age of twenty-one years. The question raised is important, for it turns on a rule of evidence which may apply to many other cases. The evidence which was tendered and admitted was a declaration in an affidavit (and therefore a solemn declaration) by the deceased father of the defendant as to the date of the defendant's birth. No doubt, if admissible, it would be strong evidence to shew what was the true date of the birth, but the question is whether it is admissible in this action, and on such an issue as is here raised. What the family of the defendant is is immaterial, whose son he is is immaterial, whether he is a legitimate or an illegitimate son is immaterial, and whether he is an elder or a younger son is immaterial; no question of family is raised in the case.

The problem we have to consider is whether this evidence, with regard to the question at issue in this case, can be received against the plaintiff. It certainly cannot, unless there is some rule which makes it evidence as against all the world. It is clear that this is hearsay evidence, and that the general rule is that such evidence is not admissible; therefore, in order to make it admissible it must be brought within some recognised exception. The question cannot be argued on principle alone, but we must look to the decisions and see whether such evidence as this in such a case as this has ever been admitted as coming within any of the exceptions to the general rule. There are many exceptions to the general rule which are well known and established. In many cases there might be much to be said on both sides if it were sought to establish the exception for the first time, but it is not the province of the Court to consider whether the original

(1) 3 Y. & C. Ex. 80. (2) 7 H. & N. 211.

rule is good or bad, nor to enunciate the principle of the exceptions, but only to see what they are.

In *Sturla* v. *Freccia* (1) Lord Blackburn enumerates the exceptions in the following terms: "It is not disputed that the general rule of English law is that hearsay evidence is not receivable, one reason probably is the want of the safeguards of cross-examination; however, undoubtedly, the law is that, as a general rule, hearsay evidence is not admissible. But to that a great many exceptions have been introduced. I do not say that if we were but beginning to make the law, we should be able to say exactly why so much should be admitted and no more, probably it would be difficult to say that in all cases; but the exceptions have been established and exist, and we have to see whether this case comes within any one of those.

"Now, my Lords, the first and one of the most important exceptions is briefly expressed in a dictum in *Higham* v. *Ridgway* (2), that documents on the face of them appearing to be against the interest of a deceased person who stated the matter, are evidence. I need not enter into the qualifications of that farther than to point out that in no point of view can this Giunta di Marina, who made this statement (and who presumably are all dead by this time), be said to have been making statements against their own pecuniary interests.

"Then, my Lords, there is a second class of cases, of which *Price* v. *Lord Torrington* (3) may be mentioned as being the earliest, establishing that where a deceased person in the course of his duty makes a contemporaneous entry of an act which he has done, and returns that in the course of his business, then after his death it would be received as evidence. That class of cases is also well established. There, again, I do not go into the qualifications, or express any opinion upon the different matters introduced, farther than to point out that in no sense can it be said that the Giunta di Marina was making any statement in the course of business contemporaneous with the fact, and it is impossible to say that it falls within that principle.

"Then, my Lords, comes another large class of cases, where, from

(1) 5 App. Cas. 623. (2) 10 East, 109.
(3) 1 Salk. 285; 2 Ld. Raym. 873.

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the nature of the thing, evidence of reputation from deceased persons is admissible,—where it is a public right or a quasi public right, evidence of reputation is admissible if you prove that the deceased person was of the class who would know it, and had stated it. Upon that again I merely say that the question we are now inquiring into, viz., the history of a private individual, is not a matter in which, in any sense, reputation generally can be received.

"Then, my Lords, there is another class of cases which comes nearer to it. It has been established for a long while that in questions of pedigree,—I suppose upon the ground that they were matters relating to a time long past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice,—but for whatever reason the statements of deceased members of the family made ante litem motam, before there was anything to throw doubt upon them, are evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by shewing that they actually made the statements, but by shewing that they acted upon them, or assented to them, or did anything that amounted to shewing that they recognised them." (1)

I think Lord Blackburn intended to make an exhaustive definition of the exceptions to the rule against the admission of hearsay evidence, and he distinctly states that "*in questions of pedigree*" the statements of deceased members of the family "*are evidence to prove pedigree.*" If that is true, and if what I have stated (that no question as to family is at issue in the present case) is right, how can anyone say that the evidence in this case was given on a question of pedigree to prove pedigree? Therefore this evidence is not brought within the exception. A strong opinion was expressed by Patteson, J., in *Figg* v. *Wedderburne* (2), that in a case like the present such evidence as this is not admissible. There is also a strong opinion of Pollock, C.B., in *Plant* v. *Taylor* (3), where he said, "In an action for goods sold and delivered, declarations of a deceased parent are not admissible to prove the defendant is an infant. It is different where the

(1) 5 App. Cas. at pp. 640, 641. (2) 11 L. J. (Q.B.) 45; 6 Jur. 218.
(3) 7 H. & N. at p. 227.

question is one of pedigree." This is an authority to shew that the question raised in the present case is not a question of pedigree within the meaning of the rule.

For these reasons I am of opinion that this evidence does not come within any of the recognised exceptions, and therefore is inadmissible, and the order of the Divisional Court directing a new trial was right. I have listened with great interest and satisfaction to the able argument of Mr. Willis, who has taken every point which could be taken on behalf of his client, but he has nevertheless failed to convince me.

BOWEN, L.J. I am of the same opinion, and I also agree that Mr. Willis has addressed a very able argument to us. The exact point is that in such an action as the present, and on such an issue, the declaration of a deceased person is not admissible, for the question at issue is not a question of family, but merely as to the age of a particular young man.

FRY, L.J. I am of the same opinion. The exceptions to the general rule against admission of hearsay evidence have been explained by Lord Blackburn in *Sturla* v. *Freccia* (1) in the passage quoted by the Master of the Rolls, and Lord Kenyon, C.J., in *Rex* v. *Eriswell* (2) also said, "I admit that declarations of the members of a family . . . . are received in evidence as to *pedigrees* . . . . That, however, has been always understood to be an excepted case, and to stand on reasons peculiar to itself." The same view has been adopted in other cases down to the present time. Now, is this a question of pedigree? Whose son the defendant is, or who his relations are, or any question relating to his family, is wholly immaterial. I am of opinion that it is not a question of pedigree, and therefore I agree with the other members of the Court.

Appeal dismissed (3).

Solicitors for plaintiff: *Wakeford, May, & May.*
Solicitors for defendant: *Cookson, Wainewright, & Pennington.*

(1) 5 App. Cas. 623.
(2) 3 T. R. at p. 723.
(3) Reported by P. B. Hutchins, Esq.

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May 16.

[IN THE COURT OF APPEAL.]

MORGAN *v.* THE LONDON GENERAL OMNIBUS COMPANY.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 8—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—"*Journeyman*"—"*Labourer*"—"*Otherwise engaged in Manual Labour*"—*Omnibus Conductor.*

An omnibus conductor engaged at daily wages, paid daily, is not a "person to whom the Employers and Workmen Act, 1875, applies," and therefore is not entitled to the benefit of the Employers' Liability Act, 1880.

Judgment of the Queen's Bench Division (12 Q. B. D. 201) affirmed.

ACTION under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

The plaintiff was employed by the defendants as conductor of one of their omnibuses at wages of 4*s.* per day, paid daily. In consequence of a defect in the ironwork by which the "monkey-board" (the conductor's standing-place at the back of the vehicle) was supported, the plaintiff fell and was injured.

At the trial before the judge of the Shoreditch County Court, it was objected on the part of the defendants that the action was not maintainable, inasmuch as the plaintiff was not a "person to whom the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90) applies."

The county court judge so held and non-suited the plaintiff. The plaintiff appealed to the Queen's Bench Division; but that Court, consisting of Day and Smith, JJ., affirmed the decision of the county court judge (1), but gave leave to appeal. The plaintiff accordingly appealed to this Court.

S. H. Leonard, for the plaintiff. The question in this case really depends upon the true construction of the Employers and Workmen Act, 1875, s. 10. The plaintiff is probably both a "labourer" and a "journeyman" within the meaning of that enactment; at all events, he is one of the same class. In *Wilson* v. *Glasgow Tramways and Omnibus Co.* (2), the views expressed

(1) 12 Q. B. D. 201.

(2) 5 Ct. Sess. Cas. 4th Series, 981, at pp. 988, 989.

by the Lord Justice Clerk and Lord Ormidale strongly support the contention for the plaintiff; for there can be no distinction between the conductor of a tramcar and of an omnibus. A person may be "engaged in manual labour" within the meaning of the statute, even although he has in addition duties of a different kind to perform: *Shaffers* v. *General Steam Navigation Co.* (1) The words used by the legislature are very wide. The conductor of an omnibus is employed about a mechanical contrivance or machine, and his duties are manual.

Sir H. Giffard, Q.C., and *A. Cock* (*Beresford* with them), for the defendants, were not called upon to argue.

BRETT, M.R. In construing Acts of Parliament the judges of the Queen's Courts must use their own knowledge of the various employments existing throughout the realm; and this appears to have been the view adopted in the county court; the decision was there left to the knowledge of the court. In order to ascertain the meaning of the statute, it must be recollected that the legislature intended to give relief to workmen: the Employers' Liability Act, 1880, uses the word "workman;" and in s. 8 an interpretation clause is inserted for the purpose of explaining its meaning. Therefore it seems likely that it was intended to include some persons besides workmen; it may include them and treat them on the same footing as workmen: but by an interpretation clause the legislature may also restrict the meaning of a word. In the interpretation clause of both the Employers and Workmen Act, 1875, s. 10, and the Employers' Liability Act, 1880, s. 8, the word "means" is used; this shews that the classes of persons mentioned and no others were intended to be comprehended within the operation of the Acts. The word "otherwise" used in the earlier enactment shews that the statutes were intended to apply only to those engaged in manual labour: they do not extend to any others. The classes enumerated are "labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour." Let me test for a moment the meaning of these words: neither a carpenter, a bailiff, nor the clerk of a parish can be described as

(1) 10 Q. B. D. 356.

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a "labourer;" but a man employed to dig the ground is a "servant in husbandry:" a stevedore may be a person "engaged in manual labour." As to the conductor of an omnibus, I cannot think that he falls within any of the classes enumerated: he is not "engaged in manual labour," he does not lift the passengers into and out of the omnibus; it is true that he may help to change the horses, but his real and substantial business is to invite persons to enter the omnibus and to take and keep for his employers the money paid by the passengers as their fares: in fact, he earns the wages becoming due to him through the confidence reposed in his honesty. Reliance has been placed by the plaintiff's counsel upon *Wilson* v. *Glasgow Tramways and Omnibus Co.* (1) I shall not try to distinguish between the conductor of a tramway car and the conductor of an omnibus; we are not bound by the opinions which have been cited to us, and we must act upon our own views. We must very respectfully differ from the opinions pronounced by the learned judges in the Scotch Court. The judgment of the Queen's Bench Division was right.

BOWEN, L.J. I am of the same opinion. The question is whether the present case falls within the meaning of the two Acts of Parliament, the Employers and Workmen Act, 1875, and the Employers' Liability Act, 1880. The best plan of interpretation is to read the words in their ordinary sense, unless something occurs which renders this impossible. The meaning of the word "workman" is defined. The plaintiff is neither a labourer nor a journeyman. Is he "otherwise engaged in manual labour?" It seems to me that "manual labour" can only mean "labour performed by hand;" and it is very plain that the plaintiff is not engaged in work of that kind. I concur in the views of the Master of the Rolls. As to *Wilson* v. *Glasgow Tramways and Omnibus Co.* (1), I wish to point out that the facts might be distinguishable; but if they were not, I cannot agree with the opinions expressed by the learned judges.

FRY, L.J. I agree. I fail to see in the statutes any word which will include the plaintiff. In *Wilson* v. *Glasgow Tramways*

(1) 5 Ct. Sess. Cas. 4th Series, 981.

and Omnibus Co. (1) one judge—Lord Gifford—avoided giving any opinion on the point now before us.

Judgment affirmed.

Solicitors for plaintiff: *Mackreth, Bramall, & White.*
Solicitors for defendants: *Harries, Wilkinson, & Raikes.*

J. E. H.

[IN THE COURT OF APPEAL.]

Aug. 5.

LEA *v.* PARKER.

County Court—Practice—Security for Costs—Remission of Action to County Court—"Visible Means" of Plaintiff—County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 10.

By the term "visible means" as used in s. 10 of the County Courts Act, 1867, is intended such means as could be fairly ascertained by a reasonable person in the position of the defendant.

On the filing of the affidavit the jurisdiction of the judge arises, and he is to satisfy himself not merely whether the plaintiff has any "visible means," but whether he has any means at all of paying the costs, and the judge has a judicial discretion whether he will make the order.

On an application under s. 10 of the County Courts Act, 1867, it appeared from the affidavit that the defendant was in possession of certain property of the plaintiff under a claim for rent for 5929*l.*, that the plaintiff had no property upon which an execution under a judgment for 2404*l.* could be levied, that his furniture had been sold under an execution, and that he had assigned his property for the benefit of his creditors. It also appeared that the plaintiff was being employed as a colliery manager at a weekly wage of 4*l.*, the employment being determinable on three month's notice, or on payment of three months' salary in lieu of notice, or without notice in the event of wilful misconduct:—

Held, that whether or not the salary could be attached, the plaintiff had no substantial means of paying the costs of the action in the event of the verdict being for the defendant, and that an order was rightly made under s. 10.

Counsel v. *Garvie* (Ir. R. 5 C. L. 74) considered.

APPEAL by the defendant from the judgment of Field, Manisty, and Lopes, JJ., rescinding an order of Denman, J., in chambers, and confirming an order of the Liverpool district registrar.

In an action for wrongfully breaking and entering the plaintiff's dwelling-house and for conversion, the defendant, a sheriff's officer, applied to the Liverpool district registrar that the plaintiff

(1) 5 Ct. Sess. Cas. 4th Series, 981.

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should be ordered under 30 & 31 Vict. c. 142, s. 10 (1), to give security for costs, or that the action should be remitted to the county court, on the ground that the plaintiff had no means whatever.

The defendant stated in his affidavit that from inquiries he had made as to the plaintiff's means, he believed that the only property of the plaintiff consisted of a joint share in a leasehold colliery and coal yard; that the defendant was in possession of both the colliery and coal yard under a claim for rent for two sums of 4967*l.* and 962*l.*; that he held a warrant to levy 2404*l.* against the plaintiff and his brother, but was unable to execute it owing to the plaintiff having no property upon which to levy; and that the whole of the plaintiff's furniture had been sold under an execution, and his property assigned for the benefit of his creditors. On these facts the defendant stated that he believed that the plaintiff had no means whatever.

On the 22nd of April, 1884, the district registrar made the order applied for, but with leave for the plaintiff to apply to discharge it, if before the cause was remitted to the county court the plaintiff should get an appointment which he alleged that he expected. The plaintiff obtained the appointment under an agreement whereby he was to be employed for two years as a colliery manager, the employment being determinable by three months' notice, or on payment of three months' salary in lieu of notice, or without notice in the event of wilful misconduct. Thereupon the order was discharged by an order made on the 24th of May.

(1) By 30 & 31 Vict. c. 142, s. 10: "It shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort may be brought in a superior Court, to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff, and thereupon a judge of the Court in which the action is brought shall have power to make an order that unless the plaintiff shall within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the masters of the said Court, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior Court, all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge as aforesaid, that the cause be remitted for trial before a County Court to be therein named . . ."

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The last-mentioned order was rescinded by Denman, J., in chambers, but his decision was reversed by Field, Manisty, and Lopes, JJ., who were of opinion that the plaintiff had "visible means" within the meaning of 30 & 31 Vict. c. 142, s. 10.

The defendant appealed.

Forbes Lankester (with him, *W. R. Kennedy*), for the defendant. By "visible means" is meant that upon which execution may be levied. In *Counsel* v. *Garvie* (1) it is said by Whiteside, C.J., "One question raised in this case is, what is meant by 'visible means'? Now I prefer the word 'tangible,' and can it be contended that, if a man has an office to which a salary is attached, he is possessed of no tangible means, because his property is not visible to the eye? Clearly not, I think; by 'visible means' is meant properties which the defendant could reach to pay his costs, in the event of his obtaining a verdict." The only question is whether the salary constitutes "visible means." But it is not attachable: *Webb* v. *Stenton*. (2) The case of *Gordon* v. *Jennings* (3) is distinguishable, for there a debt was actually due. Even if the salary were attachable, the Court should, in the circumstances, make the order, for judgments are outstanding against the plaintiff.

Emden, for the plaintiff. The Divisional Court took the broad ground that a person with £200 a year is justified in bringing an action in the High Court. *Counsel* v. *Garvie* (1) is in favour of the plaintiff, for the salary can be attached: *Tapp* v. *Jones*. (4)

BRETT, M.R. In this case I am of opinion that all the facts were not brought to the attention of the judges of the Divisional Court. The question turns upon s. 10 of 30 & 31 Vict. c. 142, the language of which we must construe, so far as we can, according to its plain meaning. The section says, "It shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress . . . . or other action of tort, may be brought in a superior Court"—that is, is brought in a superior Court—"to make an affidavit that the plaintiff has no visible

(1) Ir. R. 5 C. L. 74.
(2) 11 Q. B. D. 518.
(3) 9 Q. B. D. 45.
(4) Law Rep. 10 Q. B. 591.

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means of paying the costs of the defendant should a verdict be not found for the plaintiff . . . ." The whole of that is applicable to the affidavit to be made by the defendant. It directs him as to the circumstances with regard to which he may make affidavit. He may make an affidavit that the plaintiff has no "visible means." I cannot help thinking that when read according to the ordinary meaning of the words in the English language, that means that the defendant must make an affidavit that to him, and to any reasonable man in his position, the plaintiff has no means which are visible; that is, that the circumstances are such that a fair and reasonable man might make an affidavit that he could not see any means, and that no person in the position of the defendant could fairly suppose that the plaintiff had means. Unless that is so, the defendant ought not to make the affidavit. If he knew that the plaintiff had means, but made the affidavit notwithstanding, he would have made a false affidavit. The words which I have read are applicable to the defendant. Now come those which are applicable to the judge: "And thereupon"—that is, upon the defendant making the affidavit—"a judge of the Court in which the action is brought shall have power to make an order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the masters of the said Court, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior Court, all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge as aforesaid, that the cause be remitted for trial before a county court to be therein named." That gives the judge power to make the order; it does not say that he is to make it, and it is clear that he has a judicial discretion whether he will make it or not. The jurisdiction is given to the judge by the affidavit, whether the affidavit be true or false. How ought the judge to exercise that discretion? The affidavit states that the plaintiff has no "visible" means, but when it comes to the judge the question is whether the plaintiff has any means, and not whether he has any "visible" means. Suppose it to be plain upon a view of the matter that the defendant would be justified in saying that there was nothing to shew any reasonable person

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that the plaintiff had any means at all. In that case the plaintiff would have no "visible means" within the meaning of the section. Suppose that the plaintiff is able to shew the judge that he has ample means, then the moment he shews that, although the judge has jurisdiction, the only way of exercising his judicial discretion would be to say that the plaintiff should be allowed to sue in the superior Court. There would be no reason for making the plaintiff give security or alternatively to send the case to the county court, and therefore the judge ought not to exercise his jurisdiction. If he did, it would be a wrong exercise of his discretion, and so wrong that it would be matter of appeal. If the judge is satisfied that the plaintiff has no means at all, I suppose it would be a wrong exercise of discretion to allow him to continue the action in the superior Court. But there may be a doubtful state of things, and then, if the judge were to exercise his discretion, I do not think that any Court ought to interfere.

If that is so, let us see on the facts before us how this case should have been decided by the judge who was called upon to exercise a judicial discretion. The plaintiff had a contract under which he was actually employed at a salary of 4*l.* per week. It is not pretended that he has other means. But the facts must be added that judgments have been obtained against him to a considerable amount, that an attempt to enforce execution under a judgment was made, but that there was nothing upon which execution could be levied. Then, whatever may be the position of the salary, it is either not attachable at all, or, if it is, other creditors may attach it as soon as the defendant, and, in fact, much sooner, because they are already in a position to do so. I doubt whether it is attachable, but I do not think that that is the test. I think that a man might have money to pay the costs of an action, although he had nothing upon which execution could be made available. But it comes to this, that if the salary is not attachable, the utmost that could be done would be that the plaintiff should be ordered to pay the costs by instalments. But then other creditors might get a similar order. Therefore it must be perfectly clear on looking at the circumstances that it is true to say that the plaintiff, if the verdict should be against him, has no means (he may get them but he has no means) of paying the

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defendant's costs. Therefore it seems to me that the only way, in which the judge under this jurisdiction could exercise his discretion, was to order the plaintiff to find security or that the case should be remitted to the county court. We are reversing the order of the Divisional Court upon the ground that the true facts were not presented to the minds of the judges. I cannot agree with the test suggested by Whiteside, C.J., in *Counsel* v. *Garvie* (1), that the term "visible means" means "tangible" means, or with the argument that it means "means" which can be made available to execution or attachment. That meaning is, in my opinion, too narrow.

BOWEN, L.J. I am of the same opinion. I think also that the real reason why we differ from the judges of the Divisional Court is that the circumstances which really induce us to decide in favour of the appellant were not pressed upon the judges. Whatever view they have taken of this section, it seems to me that the facts, when once understood, put the plaintiff out of court: because whatever meaning is put to the term "visible means," or whatever condition is supposed to be precedent to the exercise of the jurisdiction by the judge, it is certain that a man who has no substantial means of paying the costs of an action can have no visible means of paying them, for he has no means at all. It is plain that this plaintiff has not substantial means of paying the costs. With regard to the construction of the section, the section is intended to enable a person who is threatened with litigation by an apparent pauper to drive his antagonist to the county court. He does that by going to a judge in chambers for an order that unless the plaintiff shall give full security for the defendant's costs or satisfy the judge that he has a cause of action fit to be prosecuted in the superior Court, all proceedings in the action shall be stayed, or, in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge as aforesaid, that the cause be remitted for a trial before a county court. A condition precedent to this order is that an affidavit should be made by the defendant. This affidavit is not to be that the plaintiff has no means, because the statute is not so unreasonable

(1) Ir. R. 5 C. L. 74.

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as to throw upon one party the onus of swearing point blank as to means of which he is not the person who has the best knowledge. But in order to found the jurisdiction of the judge, the defendant has only to make an affidavit that the plaintiff has no "visible means" of paying the costs of the action, that is, as I think, that he has no means which are apparent or can be reasonably ascertained. In fact, the word "visible" is introduced because it is in the affidavit of the defendant that the allegation is to be made, and it is inserted in order to enable him to limit and qualify that which he swears as to a matter not within his own knowledge. It limits it to what may be apparent to him on exercising reasonable means of inquiry. As soon as the affidavit is made the jurisdiction of the judge arises, and he has power, provided he is not satisfied that the plaintiff has a cause of action fit to be prosecuted in a superior Court, to make an order under the section. That is a judicial power to be exercised according to discretion. How is that discretion to be exercised? The affidavit alleges that the plaintiff has no visible means of paying the costs, and the first question is whether the judge is satisfied, not that the plaintiff has no "visible" means, but that he has no means, and whether the inference drawn by the defendant as to the plaintiff's means from what was apparent to the defendant was true or reasonably true; it is not necessary that the judge should be satisfied that it is absolutely true, but that it was probably true, and such as to make it fair that the judge should exercise the jurisdiction vested in him. As soon as he makes up his mind that the affidavit is fair and reasonable, and that the means of the defendant are not such as to render it reasonable that the order should be refused, he then makes the order. I do not think it is necessary to hold that the means must be equivalent to attachable means; they are means of paying the costs of the action, but not of paying them in any particular way. That being the construction of the section, it is clear that this case falls within it; but even if it came under the more narrow view of Whiteside, C.J., in *Counsel* v. *Garvie* (1), still this is a case in which the plaintiff has no substantial means of paying the costs of the action.

(1) Ir. R. 5 C. L. 74.

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FRY, L.J. I concur in the conclusions of my learned Brethren. I will only say that it appears to me that the meaning of the term "visible means" is not that put by Whiteside, C.J., in *Counsel* v. *Garvie* (1), but that which has been expressed by my Brethren. I think the term refers to means of paying the costs which are visible to the bodily or mental eye of an attentive observer, that is, means of payment which can be fairly ascertained by the person making the affidavit. It seems to me in this case that when the affidavit was made by the defendant, his statement was perfectly and literally true, and that the plaintiff had no means visible or invisible of paying the costs, and therefore that the contingency on which the discretion of the judge depended was amply made out. Then arises the question whether the discretion was rightly exercised in making the order. The matter stands thus: the plaintiff is entitled to a sum of 4*l.* a week as long as he fills a certain situation. A distress was put in upon his goods for rent amounting to nearly 6000*l.*; an execution was attempted to be levied for 2404*l.*, but there was nothing upon which to levy; the whole of his furniture was sold under an execution, and the whole of his property had been assigned to his creditors. In these circumstances it seems to me that, notwithstanding what has occurred since the matter was first before the Registrar, the plaintiff is practically without the means of paying the costs of the action. I think therefore that the appeal should be allowed.

Appeal allowed (2).

Solicitor for plaintiff: *H. Davies*, Liverpool.

Solicitors for defendant: *Burton & Co., for Tyrer, Kenion, Tyrer, & Simpson*, Liverpool.

(1) Ir. R. 5 C. L. 74.

(2) Reported by C. A. Ferard, Esq.

J. E. H.

[IN THE COURT OF APPEAL.]

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May 12.

DUCK *v.* BATES.

Copyright—Infringement—Right of representing Dramatic Piece or Entertainment—Performance of Play in Private Room—Admission without Payment —3 & 4 Wm. 4, c. 15, ss. 1, 2.

The defendant and others joined in representing a dramatic piece in a room of an hospital, without the consent of the proprietor of the copyright in the drama. The performance was merely for the entertainment of the nurses, attendants, and others connected with the hospital, who were admitted free of charge:—

Held, by Brett, M.R., and Bowen, L.J., Fry, L.J., dissenting, that the room where the drama was represented was not a place of public entertainment, and consequently that the defendant was not liable to damages or penalties under 3 & 4 Wm. 4, c. 15, ss. 1, 2.

Judgment of Queen's Bench Division (12 Q. B. D. 79) affirmed.

APPEAL by the plaintiff from the judgment of Lord Coleridge, C.J., and Stephen, J., on appeal from the judgment of a county court. (1)

The action was for damages, or, in the alternative, for penalties for 40*s.* each, under the Copyright Acts, 3 & 4 Wm. 4, c. 15, ss. 1, 2, and 5 & 6 Vict. c. 45, s. 20.

The plaintiff was assignee of the copyright in a dramatic piece called 'Our Boys,' and the defendant was member of an amateur dramatic club, which in January, 1883, gave three representations of that piece at Guy's Hospital, for the entertainment of the nurses, attendants, and others connected with the hospital. The admission was free, and the expenses of the seats and costumes were defrayed by the governors of the hospital. A general invitation was conveyed to the nurses, attendants, and others connected with the hospital through the sisters who superintended that institution, and tickets were also issued to the physicians, surgeons, and senior students of the hospital, but on the last occasion a lesser number of such tickets was so given, and in lieu thereof tickets were given to the members of the amateur club to distribute among their friends. On each occasion there were about 170 persons present. Tickets were sent to the editors of

(1) 12 Q. B. D. 79.

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five theatrical newspapers in order to obtain notices of the performance, but only one reporter came on one occasion.

The learned judge of the county court, upon the authority of *Russell* v. *Smith* (1) and *Wall* v. *Taylor* (2), was of opinion that the performance was at a place which was for the time being a place of dramatic entertainment within 3 & 4 Wm. 4, c. 15, ss. 1, 2, although no payment was taken, but it was not a public representation of a dramatic piece so as to infringe the right of the proprietor of the right of representing the play in public. On this ground he gave judgment for the defendant, and the Queen's Bench Division (Lord Coleridge, C.J., and Stephen, J.) affirmed his judgment, but gave leave to appeal. (3) The plaintiff accordingly appealed to this Court.

May 9, 10. *Arthur Charles, Q.C.* (*S. H. Leonard* with him), for the plaintiff. The room at Guy's Hospital was a place of dramatic entertainment; the present case is clearly analogous to *Russell* v. *Smith* (1); *Wall* v. *Taylor*. (4) Even although no profit accrues from the unlicensed performance, the proprietor of the copyright is entitled to a penalty of 40*s*. Profit is not the test whether an action will lie; the real test is whether the representation is an entertainment in public and not a mere performance in private; in the present case there were spectators who were invited to be witnesses of a theatrical exhibition. The tickets were transferable. Even if the word "public" is to be introduced into 3 & 4 Wm. 4, c. 15, ss. 1, 2, it will be satisfied by what took place. The object of that enactment is to secure the rights of the author and his assignees in his production; it was intended by the legislature to protect the value of dramatic pieces. The point is whether the room at Guy's Hospital was a place of dramatic entertainment. That is a question of fact: *Planché* v. *Braham* (5), and it has been found by the judge of the county court in favour of the plaintiff.

[BOWEN, L.J. The meaning of the word "entertainment"

(1) 12 Q. B. 217.
(2) 9 Q. B. D. 727.
(3) 12 Q. B. D. 79.
(4) 9 Q. B. D. 727; 11 Q. B. D. 102.
(5) 4 Bing. N. C. 17.

was much discussed in *Muir* v. *Keay* (1) and in *Howes* v. *Board of Inland Revenue.* (2)]

Those cases related to "entertainment" connected with bodily refreshment; in the present case the alleged "entertainment" is mental. The judgments in the Queen's Bench Division appear to come merely to this, that in order to constitute an infringement of the proprietor's rights there must be profit.

Lumley Smith, Q.C., and *W. Gordon Smythies*, for the defendant. Three elements must exist in order to give a right of action: first, the place of performance must be habitually used as a place of dramatic entertainment; secondly, there must be, at least under ordinary circumstances, profit; thirdly, there must be publicity. All these elements are wanting in the present case. As to the last point, the performance was in private; the audience was of a very limited kind; the circumstances that a reporter was present, and that the tickets were issued, do not make the representation public.

A. Charles, Q.C., in reply.

Cur. adv. vult.

May 12. The following judgments were delivered:—

BRETT, M.R. Once more it has become necessary to construe 3 & 4 Wm. 4, c. 15, and to apply its provisions to the facts proved at a trial. The question is as to the defendant's liability under that statute, for I think that we have nothing to do with 5 & 6 Vict. c. 45, s. 20, which is in truth amended by 45 & 46 Vict. c. 40. The literary production represented at Guy's Hospital is well known to be a dramatic entertainment, and the plaintiff is the assignee of the copyright; the defendant has been party to acting the plaintiff's drama: has he been guilty of a breach of the statute? We must consider what is the phraseology of the enactment as to its subject-matter: it was intended to give to the author a right to what he has written. We are allowed to rest upon the assistance to be derived from other parts of the statute, and we may look generally at its provisions. I agree that what was intended to be protected was the value of the author's invention, that is the key to the construction of the

(1) Law Rep. 10 Q. B. 594. (2) 1 Ex. D. 385.

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Act: he does not want sentimental protection: he has power himself to represent his drama, and to confer upon others the right to represent it. That power gives a value to his production. If an author performs his drama, and if it is performed also by another, the author will be injured. At first sight the statute seems directed against representing a dramatic piece for profit, but if a company of players were to act a play, even although they derived no profit, the author would be injured: and the only limit to the injury would be the interest of the company of players: therefore in order to constitute a breach of the statute, it is not necessary that there should be profit; that has been already decided. Again, is a breach of the statute committed only when a dramatic piece is represented in a place ordinarily kept for dramatic entertainment? If this question is to be answered in the affirmative, the statute will be infringed only when the performance takes place in a licensed theatre. But a dramatic piece may be acted elsewhere than in a licensed theatre, and persons without the author's consent may act his drama in places not habitually devoted to dramatic entertainment. In my opinion, in order to come within the prohibition of the statute, a place need not be kept habitually for the exhibition of dramatic entertainments: it is not correct to say that the statute is infringed only when the place is habitually used for dramatic entertainments. It seems to have been supposed that I said that the representation of a dramatic piece, wherever it may be acted, makes the place where it is performed a place of dramatic entertainment. (1) I believe that I did not say so; but if I did, I was wrong. I do not pretend to have expressed myself with sufficient clearness, but I do not think that my words will really bear that construction. In describing the place to which the statute is to apply, the legislature uses the words "any place of dramatic entertainment." From these words it is obvious to me that there is some place where a dramatic piece may be represented without an infringement of the statute: if it is not a place of dramatic entertainment, no breach is committed: the statute requires that the dramatic representation shall be performed at a place of dramatic entertainment. The legislature has not used merely

(1) 11 Q. B. D. 106, 107.

the words "tragedy, comedy, or farce;" it has also used the large words "dramatic piece or entertainment," because, owing to the ingenuity of authors, less comprehensive terms would have given rise to frequent evasions: and if the legislature could have foreseen what has taken place in the present instance, the word used would have been rendered more applicable to the facts before us. Did the legislature intend to forbid a representation without the author's consent by children in a nursery before their parents or by grown-up persons in a drawing-room? It is clear that something more than that must have been intended; and why should not a representation of that kind be called a dramatic entertainment? Because it is obviously domestic and private. Suppose that the servants of the household are invited to witness the performance: nevertheless it is a domestic entertainment. As I have already intimated, the author wants protection for the pecuniary value of his drama; and a representation in a private room is of no pecuniary value. In order to entitle the author to penalties, there must be a representation which will injure the author's right to money; such, for instance, as a representation, which, although it is not for profit, would attract persons who are willing to pay money, and would induce them not to go to see a performance licensed by the author. Suppose that a representation in the presence of friends takes place for the amusement of friends and of the members of the household in an unfurnished house hired for the occasion; that is not an infringement of the statute: the representation must be other than domestic and private. There must be present a sufficient part of the public who would go also to a performance licensed by the author as a commercial transaction; otherwise the place where the drama is represented will not be a "place of dramatic entertainment" within the meaning of the statute. Suppose that a drama is represented in a country town, and that all persons of a certain class throughout the county are free to come: suppose that a member for a parliamentary borough (I do not mean shortly before or during an election) organises dramatic entertainments, to which the inhabitants are admitted without payment: suppose that an amateur company choose to act some drama for a charitable object with admission upon payment of

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money or by tickets issued generally: in each of these instances an infringement of the statute has been committed. I have tried to express myself with clearness as to my view of the general object of the statute: the words used in s. 1 point to the same conclusion. The true meaning is shewn also by the words of s. 2 as to the principle upon which damages are to be assessed; the proper ground at first sight seems to be the amount of profit made by the representation; but upon this principle the damages would be limited to the amount which those infringing the author's right may earn: they may act for nothing, and therefore the protection to the author would be insufficient: therefore the legislature has included within the provisions of the Act a company which is not acting for profit. A private representation will not injure an author: but a public representation—that is, a representation to which any portion of the public are freely admitted either with or without payment—is prohibited by the statute, unless the proprietor of the copyright consents thereto. I do not pretend that my definition is exhaustive; and I do not shrink from any criticism upon it. The judge of the county court has found the facts of the case; and to whatever criticism his reasons may be liable, we have the materials before us sufficient for our decision. In the present case the performance took place before the nurses and the attendants of Guy's Hospital: the work done at that institution is sad, but useful: the performance was intended to amuse the nurses and the attendants; to these were joined the medical men and the students who work within the walls of the institution; and the families of the medical men also might be present. Notwithstanding the presence of all these persons the representation was domestic: it was not public. It is necessary, however, to go one step further: it was said that the tickets of admission were transferable, but they were not generally transferable, but only to a limited number of friends: the important body consisted of the nurses and the medical officers. There was, it is true, the invitation to the reporters, which seems at first sight to be startling: but only one reporter came upon one occasion; and the invitation to the reporters was really a mere piece of vanity: it is too childish to consider that the presence of one reporter constituted an infringement of the statute. In this

particular case, with some satisfaction, I come to the conclusion that the representation complained of was not within the prohibition of the statute, and that the decision of the Divisional Court was right. But I wish to say by way of warning that those who go beyond the facts of the present case, may incur the penalties of the statute.

BOWEN, L.J. We have to construe a statute which it is not easy to interpret; the subject-matter is difficult, and the words used are vague. Was the room at Guy's Hospital converted into "a place of dramatic entertainment"? It is difficult to put a limitation upon the meaning of these words. The statute 3 & 4 Wm. 4, c. 15, gives to the author and his assignee a right of property in his production. We must endeavour to discover the extent to which it was intended to confer that right: we may have our own views as to what an author might reasonably claim, and what the legislature might reasonably give: but we must read the words in their ordinary meaning, and my judgment is based upon the words so read. The preamble of the statute throws no light upon the words "dramatic piece or entertainment" and "any place of dramatic entertainment." The author or his assignee is to have the sole liberty of representing his production "at any place or places of dramatic entertainment"; these words must have some meaning, for otherwise they need not have been inserted. I think that before the penalties can be recovered, the representation must be given in places of a certain description; and we must consider what places could be intended in the year 1833, when this Act was passed. I think that the legislature meant all places where the public or any portion of the public were to be entertained. The language is framed widely so as to include something more than a place habitually devoted to theatrical exhibitions; for the spot might be changed from night to night, and money might be taken at the doors, and thus the statute might be evaded. In 1833 travelling booths existed in which theatrical performances were held; or a performance might be given at a place in a provincial town selected for one night: the author would be injured without redress by performances such as these, if the statute were held to apply only to places habitually devoted to dramatic entertainment. The true

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view is that in order to incur the penalties of the Act, the place of dramatic entertainment must be some spot for the occasion appropriated to the dramatic entertainment of a portion of the public; and then the question of fact will arise, whether the place has not been so appropriated on any particular occasion: profit is a very important element: the question of numbers also is very important: these are matters to be taken into consideration. Applying the rule to the facts before us, I think that the present case, although it approaches the line, nevertheless falls short of the line. Some domestic or quasi-domestic entertainments may not come within the Act; suppose that a club of persons united for the purposes of good fellowship gives a dramatic entertainment to its members; I do not say that the entertainment will necessarily fall within the prohibition of the statute. In the present case the nurses and the attendants of the hospital spend their lives in endeavouring to relieve the pain of sufferers, and persons of a kind disposition were endeavouriug to lessen the monotony of the service. The body of dramatic performers were desirous of amusing those in the service of the hospital. There was therefore no appropriation of the building even for the occasion to the entertainment of any portion of the public: it was to be an entertainment of a domestic character. It is true that on the last occasion of the representation the members of the amateur dramatic club brought their friends: but I think that this was nothing more than the friendly admission of a limited portion of a domestic audience. Reporters were asked, and one came; but the object was not to entertain the public or to perform to the public, but merely to describe to the public the performance which had already taken place. There is a broad distinction between the present case and a performance to which the public at large or any portion of the public are invited; but the question must be to a certain extent a question of fact. I join in the warning with which the Master of the Rolls concluded the judgment just pronounced by him, but I agree with his view, and I am of opinion that the judgment of the Queen's Bench Division was right.

FRY, L.J. I differ from my learned Brothers, and also from the judges in the Queen's Bench Division. I think that this is

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a difficult question, and I agree with what the Master of the Rolls has said as to 5 & 6 Vict. c. 45, and that the question arises solely upon 3 & 4 Wm. 4, c. 15. I refer to the words used in s. 1: "the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment;" and "at any place or places of dramatic entertainment whatsoever;" and "any such production as aforesaid." The legislature was anxious to use words of wide meaning, and it seems to me that in the present case the room at Guy's Hospital was a "place of dramatic entertainment." In the first place, it is to be borne in mind that nothing is said as to the place in question being an ordinary or usual place of entertainment. Nothing could have been easier than for the legislature to have so spoken of it, if that had been its mind and intention. Again, nothing is expressly said as to its being a public place of entertainment. Lastly, nothing is expressly said as to the performance being for reward or hire, or gain or profit. It has been said that we must have regard to the state of things in 1833 when the Act was passed; and that as plays were, for the most part, then acted in playhouses, we should conclude that the legislature referred to playhouses only. That, it appears to me, would be misinterpreting the words of the legislature. The legislature must have known that great changes had taken place in the mode of acting dramatic pieces, and that comparing the modes of such performances in the reign of Elizabeth or James I. with those in the reign of William IV., very considerable alterations had occurred. It is probable there were far more strolling players in the former reigns than in the latter. It is certain that in the Elizabethan period plays were acted in many other places than regular theatres, and that masques then prevailed which had fallen into desuetude in the reign of William IV. It seems to me, therefore, to be plain that the legislature must have contemplated the probability of changes taking place also in the future. Therefore it is that such general words are used. Finally, I must observe that two words in the phraseology of the Act appear to me extremely important; they are the words "any" and "whatsoever." What is the force of these words? In my judgment, it is to exclude any limitation or qualification of the other words used, and to declare

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affirmatively that the genus of place described by the legislature shall be taken in its utmost generality. In my opinion, the words used negative qualification and affirm generality. I have come therefore to the conclusion that the place need not be a place habitually devoted to theatrical exhibitions, and on this point I adopt the reasons of the Master of the Rolls.

In the next place, I am unable to find any words which import that the performance must necessarily be for reward or hire. If such words had been introduced, a distinguished body of amateurs, who were willing to act for the mere pleasure of acting, might rival a body who are endeavouring to earn their livelihood by acting for reward, and might defeat the right of the author of the dramatic piece. I therefore agree with my learned Brethren in thinking that "hire," though an important, is not an essential element. But it has been said, and truly said, that the words "any place or places of dramatic entertainment" import something different from a place where a dramatic piece happens to be represented: for they are added in the Act by way of qualification. I will, therefore, inquire what are the notions involved in a dramatic entertainment? In the first place, I think that there is no dramatic entertainment unless somebody is entertained or amused, or there is the intention to entertain or amuse some one. I think, therefore, that the studies of the actors and a rehearsal—even before an audience where the main object is that of improving the performers in their parts, and not the amusement of the spectators—do not constitute a dramatic entertainment. I am therefore of opinion that the author of the piece could not interfere to prevent these preliminary studies or rehearsals, although they took place without his licence, I think, further, that the notion of a dramatic entertainment involves, to some extent, the gathering of a meeting, assembly, or concourse of people with a view to their amusement. If during the rehearsal in a barn some persons who were casually outside looked through the door and saw what was going on, I should say there was no dramatic entertainment, because the amusement given would be accidental merely. In the next place, I think the notion of a dramatic entertainment involves this, that the performance is the result of a plan, design, or scheme; that the actors desire

and design to amuse the spectators, and that the spectators come together for the purpose of being amused by the actors. Does it also involve the notion of publicity, or any particular mode of selecting the audience? I think not. According to my view of the usage of the English language, the performance of a dramatic piece in a large drawing-room, or in the hall of a large mansion, or at a castle in the country, although the public may not be invited to it, would be a dramatic entertainment. A lady who invites a number of musical performers, whether amateur or professional, to her drawing-room, and invites her friends to come and listen to the music, in my opinion gives a musical entertainment. If you were asked what was going on there, you would say a musical entertainment. If you were asked whether it was a public or a private one, you might well say it was a private musical entertainment. In like manner I cannot find a better illustration of a dramatic entertainment than that which is afforded by what took place in the board-room of Guy's Hospital on the evenings in question. If one nurse had asked another what amusement they were going to have that Christmas, and the other replied, "We are going to have a dramatic entertainment," I think that the answer would have been in accordance with the ordinary usage of the English language. I differ therefore unfortunately from my learned Brethren in their view that publicity is necessary.

It has been said that it is absurd to extend the words of the Act to internal and domestic representations. It is quite true that there may be some internal and domestic representations, which it would be absurd to suppose that the legislature had in its mind. It is difficult to suppose that the acting of some children before their parents in the nursery or drawing-room would be a dramatic entertainment within the meaning of the Act. But if my definition be right, such would not be a dramatic representation within the meaning of the Act. But on the other hand, it seems to me that there may be internal and domestic representations, which are well within the purview of the statute. Suppose, for instance, that a nobleman possessed of a large mansion in the country, having his house full of distinguished guests, invites them, his servants, and such of the residents in the county

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as are in the habit of visiting him, to witness the representation of a dramatic piece; is not such a performance domestic and internal? but is it not at the same time a performance which would probably interfere with the proprietary rights of the owner of the piece? What would be the chance of the next company which came to the adjoining town to perform the same piece, getting together so good an audience as they would get, had the piece not been performed in the neighbouring mansion of the nobleman? It appears to me, that the rights of the proprietor of the piece would have been seriously interfered with.

I will next inquire whether the 2nd section of the Act, which gives the author the right of receiving money from the offender, throws any light upon the nature of the right given, or shews that it is of a more limited kind than that which I have described. What is the pecuniary benefit which the 2nd section gives to the author? It is such a one of three as he may choose; either (1), 40*s.* for every representation, or (2), the amount of benefit derived by the offenders; or (3), the amount of injury sustained by himself. The legislature has provided, therefore, for the case where there is neither benefit to the actor nor injury to the author. What can that be, except such a case as I have mentioned, the case in which the proprietary right has been infringed by persons who derived no benefit from the infringement, and in such a degree as not to injure the author? In that case the legislature says that the author may still have 40*s.* I think, therefore, that this section confirms the conclusion at which I have arrived.

I therefore come to the conclusion that the present case falls within the prohibition of the statute, and I differ from the decision of the Queen's Bench Division.

Judgment affirmed.

Solicitor for plaintiff: *B. C. Cowan, for J. A. Tucker, Bath.*
Solicitors for defendant: *Burgess & Cosens.*

J. E. H.

[IN THE COURT OF APPEAL.]

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Aug. 7.

BAILEY *v.* BAILEY.

Practice—Order to sign Final Judgment—Order XIV., r. 1—Alimony pendente lite—"Debt or liquidated Demand."

An order to sign final judgment under Order XIV., r. 1, will not be made where the action is for arrears of alimony pendente lite, payable under an order of the Probate and Divorce Division.

MOTION by way of appeal from an order of the Master (referred by Denman, J., to the Court) that the plaintiff should be at liberty to sign judgment under Order XIV., r. 1.

It appeared from the affidavit of the plaintiff that the defendant was her husband, against whom she had instituted proceedings in the Probate and Divorce Division, and that in May, 1883, he was ordered by one of the Registrars of that Court to pay to her alimony pending suit at the rate of 2*l.* a week, and that the writ was issued for 66*l.* 4*s.* arrears of such alimony.

June 23. *Morton W. Smith*, for the plaintiff. The alimony due from the defendant constitutes a "debt or liquidated demand in money" payable by him within Order III., r. 6, so as to enable the writ to be specially indorsed and application made to sign judgment. The Divorce Court cannot vary an order for alimony so as to affect payments already due. It is true that an order may be made reducing the amount of alimony as previously fixed, but such an order applies only to future payments. An application for alimony is a distinct and separate suit, and an order for alimony is equivalent to a judgment. In *Hodsoll* v. *Baxter* (1), where an action had been brought on a judgment debt, it was held that the writ could be specially indorsed and judgment signed for want of appearance under s. 25 of the Common Law Procedure Act, 1852, which authorizes the indorsement only where the claim is for "a debt or liquidated demand in money arising upon a contract expressed or implied." This decision, though not upon Order III., r. 6, is upon the construction of

(1) E. B. & E. 884.

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similar words and ought to govern the present case. It has also been followed in *Grant* v. *Easton* (1), where leave was given to sign judgment under Order XIV. in an action upon a foreign judgment.

H. Wildey Wright, for the defendant. A judgment debtor summons is not the proper mode of enforcing an order for alimony, for under 20 & 21 Vict. c. 85, s. 52, it is provided that orders to be made by the Divorce Court are to be enforced and put in execution in the same manner as judgments of the Court of Chancery. An order for alimony is an interlocutory and not a final judgment, and the Divorce Court can vary the amount payable, for example, where the wife has been guilty of misconduct. In *Ex parte Holden* (2) the Court left the question of how far a decree for alimony could be enforced by entering it on the registry of judgments, undecided, regarding it as a point fit for discussion. To grant the present application would go much further.

GROVE, J. I am of opinion that the present order for payment of alimony pendente lite is not within the principle laid down in *Grant* v. *Easton* (1) and *Hodsoll* v. *Baxter* (3), that the amount due upon a judgment constitutes a debt within Order XIV. This order contemplates that the plaintiff shall shew clearly by his affidavit that a debt is due, and if the defendant does not make out a satisfactory answer there shall be immediate judgment, either absolutely or on terms. The object of the order is of course to prevent a debtor who unquestionably owes a debt from putting the creditor to great expense with the chance of the debtor proving insolvent. The words of Order III., rule 6, are, "Debt or liquidated demand in money arising upon a contract express or implied;" and the instances given are a bill of exchange, bond, or guaranty, where the claim against the principal is in respect of a debt or liquidated demand only. The case of *Grant* v. *Easton* (1) was decided by the Divisional Court upon the authority of *Hodsoll* v. *Baxter* (3), a decision upon s. 25 of the Common Law Procedure Act, 1852, which uses substantially the same words as this order. Besides being a decision of the Court of

(1) 13 Q. B. D. 302. (2) 32 L. J. (C.P.) 111.
(3) E. B. & E. 884.

Error, *Hodsoll* v. *Baxter* (1) has now been sanctioned by the Court of Appeal in *Grant* v. *Easton* (2), which carries the meaning of the word "debt" somewhat further than every lawyer, in the absence of authority, would have been disposed to carry it. However, we are bound by the decision, and it must be taken that an ordinary judgment debt is upon the same footing as any other debt due upon an implied contract; and that while it is unreversed, the debt upon which it is founded cannot be investigated de novo.

Now these two decisions were upon final judgments, and there has been no case applying their principle to interlocutory judgments, which for this purpose are very different matters. I do not say that this order is in all respects an interlocutory judgment. It has more the character of a provisional order; the object being to provide maintenance for the wife while the suit is pending. The very term "pendente lite" implies, I think, that it is subject to the control of the Court in which the suit is commenced, which may set aside, vary, or introduce new terms in it. It has also been shewn that with reference to unpaid instalments of alimony the Court has frequently varied, changed, or possibly annulled it. But the plaintiff has contended that instalments already due and unpaid are in the nature of debts and are not upon the same footing as instalments due in the future. It may well be that there are cases in which the Court might interfere with respect to future but not with respect to past payments, but no case has been cited to shew that the Divorce Court has not the power to interfere with respect to past payments. If the Divorce Court had no such power of varying its order the greatest injustice might be done, for the wife may have misconducted herself after the date of the order. For example, she may have absconded, giving her husband no opportunity of paying the alimony, and he may have supported the children for whose sustenance the alimony may have been mainly designed, and with reference to whom the amount may have been calculated. In such a case is the wife to be at liberty after a long absence to return and claim the arrears? And can she, by proceeding under Order XIV., deprive the Divorce Court of any

(1) E. B. & E. 884. (2) 13 Q. B. D. 302.

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power of interfering and varying the decree? I think that such a proposition is monstrous, and that there is nothing in the decisions to support it.

I would further observe, that if the law were as is contended by the plaintiff, it would lead to a conflict of jurisdiction between the Divorce Court having power to vary an order for alimony and this Court which has no such power, and might, by directing final judgment under Order XIV., oust the jurisdiction of the Divorce Court. I think that this is an attempt to carry Order XIV. further than was ever designed, and that it cannot succeed.

The word "debt" is not applicable to money due under interlocutory orders, particularly one of this description.

HUDDLESTON, B., concurred.

Order of Master rescinded.

A. P. S.

The plaintiff appealed.

Aug. 7. *Morton W. Smith,* for the plaintiff. The order for the payment of alimony was in the nature of an interlocutory judgment, and a writ of summons may be specially indorsed, and judgment may be signed under Order XIV. in respect of any judgment, whether English or foreign: *Hodsoll* v. *Baxter* (1); *Grant* v. *Easton* (2); *Henderson* v. *Henderson* (3); *Hutchinson* v. *Gillespie.* (4) It is true that no action will lie upon the judgment of a county court; but that is because a specific remedy by execution is created, and also because the judge of a county court has power to vary his judgment. The jurisdiction to order the payment of alimony now depends upon the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 6, 32. Formerly a husband might have been attached for disobedience to an order for the payment of alimony by process issuing out of the Court of Divorce; but it appears at least doubtful whether that remedy now exists, since the coming into operation of the Bankruptcy Act, 1883. The plaintiff desires to obtain a judgment of the High Court, because she can then present a petition in bankruptcy and thereby enforce payment of the alimony ordered

(1) E. B. & E. 884.
(2) 13 Q. B. D. 302.
(3) 6 Q. B. 288.
(4) 11 Ex. 798.

by the Divorce Division. The defendant has filed no affidavits in answer to the plaintiff's application for judgment, and must be taken to have no merits.

Wildey Wright, for the defendant, was not called upon to argue.

BRETT, M.R. This appeal must be dismissed. We cannot make an order empowering the plaintiff to sign judgment summarily upon a writ of summons specially indorsed with an order for alimony, and the reason is that an action will not lie upon that order. It is an old and well-known rule of construing statutes, that when a special remedy is given for the failure to comply with the directions of a statute, that remedy must be followed, and no other can be supposed to exist. In a Court of Common Law no right to alimony existed: at all events, the power to make an order did not by the common law exist in the Court of Divorce, because that Court was created by the legislature, when it passed 20 & 21 Vict. c. 85. The remedy intended to be given for disobedience to the decrees and orders of that Court is described in s. 52 of that statute, which is in the following terms: "All decrees and orders to be made by the Court in any suit, proceeding, or petition to be instituted under authority of this Act shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution." This enactment provides that all the existing remedies of the Court of Chancery may be used for enforcing a decree or an order of the Court of Divorce. Would an action lie in a Court of Common Law to enforce a decree of the Court of Chancery? Clearly it would not, at least under ordinary circumstances. There was always power to sue upon the judgment of a Court of Common Law; but no promise could be implied at common law to obey a decree of the Court of Chancery; and therefore a remedy by action for disobedience to a decree of the Court of Chancery did not exist at common law, and a decree or order of the Divorce Division can be enforced only in the manner pointed out by s. 52. We go upon higher grounds than those stated in the Queen's Bench Division, but the reasons given by Grove, J., are also weighty.

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BOWEN, L.J. I am of the same opinion. An obligation to pay a sum of money created by statute may be enforced by action, and the High Court has power in such an action under the Rules of the Supreme Court, 1883, Order III., rule 6, and Order XIV., at least in some instances, to make an order summarily for payment of the money due by force of the statute, for it is a debt created by statute. Again, an action at common law will lie upon the judgment of a Court of Common Law, for it will be assumed that the amount for which judgment has been signed is actually due. The whole of the reasoning applicable to the subject is admirably stated in the judgments of Alderson and Bramwell, BB., delivered in *Hutchinson* v. *Gillespie.* (1) It is there pointed out that no action will lie upon a decree in equity, because no promise can be implied at common law to pay a mere equitable debt, and that no action will lie upon the judgment of a county court for the reasons stated in *Berkeley* v. *Elderkin* (2); those reasons are that where new rights are given with specific remedies, the remedy is confined to those specifically given, and moreover that the judge of a county court has power to rescind or alter his judgment. The principles laid down in *Hutchinson* v. *Gillespie* (1) apply to the present case. The only remedy for disobedience to an order for the non-payment of alimony is that pointed out by 20 & 21 Vict. c. 85, s. 52. The present action will not lie.

FRY, L.J. The principles applicable to this case are well stated in the judgments delivered in *Berkeley* v. *Elderkin* (2) and *Hutchinson* v. *Gillespie.* (1) An action at law would lie only upon a legal claim, and an order for the payment of alimony is, pursuant to statute, enforceable only as an equitable and not as a legal debt; it follows that the present action cannot be maintained.

Appeal dismissed.

Solicitor for plaintiff: *J. H. Lane.*
Solicitor for defendant: *J. C. Scard.*

(1) 11 Ex. 798. (2) 1 F. & B. 805.

J. E. H.

[IN THE COURT OF APPEAL.]

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Aug. 8.

HUTCHESON & CO. *v.* EATON & SON.

Principal and Agent — Agent's Liability — Broker signing as Principal — "Broker" — Sale of Goods — Arbitration — Award — Jurisdiction of Arbitrator — "Dispute arising on this Contract."

By a contract in writing, the defendants "sold to" the plaintiffs a cargo of cotton seed cake of a specified quality. The contract contained a clause that "should any of the above goods turn out not equal to quality specified, they are to be taken at an allowance, which allowance together with any dispute arising on this contract is to be settled by arbitration." The defendants signed the contract with the addition of the word "brokers," and were acting as agents. Some time after the contract was signed, the defendants named their principals. The cargo proved to be of inferior quality, and an arbitration (which the plaintiffs did not attend) to determine the liability of the defendants was held; the arbitrators decided by their award that the defendants were not liable, inasmuch as a custom existed that a broker upon naming his principals ceased to be liable on the contract. At the trial of the action, the jury found that the alleged custom did not exist:—

Held, first, that the defendants were personally liable on the contract: secondly, by Brett, M.R., and Bowen, L.J., Fry, L.J., dissenting, that the defendants were not relieved from liability by the award, inasmuch as the arbitrators had exceeded their jurisdiction.

ACTION to recover the sum of 293*l.* 17*s.* 8*d.*

The plaintiffs were commission-merchants in Aberdeen, and the defendants were general brokers and merchants in Liverpool. During the end of January and at the beginning of February, 1883, a correspondence took place between the plaintiffs and the defendants, as to the sale by the latter to the former of a cargo of cotton seed cake, then loading at New Orleans. The defendants were acting for Hope & Sons, of Leith, and the plaintiffs understood that the defendants were acting for other persons; but the plaintiffs did not know who the defendants' principals were.

On the 5th of February, a contract in the following terms was signed by the defendants, and sent to the plaintiffs:—

"Peter's Buildings, Liverpool, 5th February, 1883.

"Messrs. Hutcheson & Co., Aberdeen.

"We have this day sold to you the following goods: The cargo of five hundred (500) tons more or less (in bags) American

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decorticated cotton seed cake, 'Hananer Oil Works' brand or equal thereto, at six pounds, twelve shillings, and six pence (6*l.* 12*s.* 6*d.*) per ton, now shipping or shipped per *Mentor*, at New Orleans. Quality guaranteed, fair average of this season's shipment. To be invoiced at shipped weights on cost, freight, and insurance terms to Aberdeen direct. Tare two (2)lbs. per bag. Out-turn guaranteed within one (1) per cent. of weight invoiced. Vessel lost, contract void. Payment to be made by cash against documents on presentation, or on arrival of vessel (at seller's option), less rebate of interest at usual rate for unexpired portion of 72 days (say seventy-two) from date of last bill of lading. Should any of the above goods turn out not equal to quality specified, they are to be taken at an allowance, which allowance together with any dispute arising on this contract is to be settled by arbitration here in accordance with the printed rules of the Liverpool General Brokers' Association.

"Brokerage—per cent. "Yours respectfully,

"Francis J. Eaton & Son,

"Brokers."

A note in similar terms was sent by the defendants to Hope & Sons. The invoice, dated the 17th of March, was sent by the defendants to the plaintiffs, but it did not name the defendants' principals. From its contents it appeared that the quantity shipped was 736½ tons. The plaintiffs refused to accept more than about 500 tons, the quantity stated in the contract. A correspondence ensued as to the excess of the cargo over the amount mentioned in the contract; and in a letter dated the 22nd of March, the defendants first named their principals, describing them as "the sellers, Messrs. William Hope & Sons, Leith." The plaintiffs refused to recognise any other persons as parties to the contract besides the defendants. Ultimately, on the 30th of March, the question as to the excess of the cargo was settled by the defendants deducting 20*l.* off the invoice-price. In exchange for the shipping documents, the plaintiffs paid for the cargo 3618*l.* 14*s.* 5*d.* The ship *Mentor* arrived at Aberdeen on the 17th of April, and soon afterwards commenced to discharge her cargo; the cotton seed cake was found to be of inferior quality. The discharge of the *Mentor's* cargo was completed on the 4th of May,

and it was then found that the delivered quantity fell short of the invoiced quantity by upwards of seven tons, representing in value 36*l.* 12*s.* 11*d.* This sum formed the first item of the plaintiffs' claim. It was agreed to submit the question of quality to arbitration, and a submission was drawn up in the following terms :—

"Adelaide Buildings, Chapel Street,
"Liverpool, 7th July, 1883.

"The undersigned hereby agree to abide by the decision of Messrs. Adamson & Jackson, arbitrators on a contract dated the 5th of February, 1883, for a cargo cotton seed cake per *Mentor*, discharged at Aberdeen, also by the decision of any umpire they may call in.

"Francis J. Eaton & Son, Sellers.
"Geo. Hutcheson & Co., Buyers."

This submission was signed by the defendants on the day of the date thereof, but it was not signed by the plaintiffs until the 17th of July. On that day Hope & Sons suspended payment. By an award, dated the 25th of July, 1883, the arbitrators awarded to the plaintiffs an allowance of 7*s.* 6*d.* per ton in respect of the cotton seed cake. This award was taken up by the plaintiffs, but the defendants refused to pay the amount due under it. This amount was 251*l.* 19*s.* 9*d.*, and formed the second item of the plaintiffs' claim. The third item was the half of the arbitration-fees and amounted to 5*l.* 5*s.* These sums, together with the sum of 36*l.* 12*s.* 11*d.*, above mentioned, amounted to 293*l.* 17*s.* 8*d.*, the sum sued for. The writ of summons was issued on the 22nd of August. At the end of September, after the commencement of the action, the defendants applied to the General Brokers' Association in Liverpool to appoint arbitrators. The arbitration was granted. The plaintiffs refused to take part in the arbitration on the ground that the matter in dispute had been settled by the previous award. The president of the association accordingly appointed two arbitrators to decide the dispute between the plaintiffs and the defendants as to the contract of the 5th of February, in alleged pursuance of the powers given by clause 12 of the Public Sales Conditions, from which the following is an extract: "The award of any two arbitrators in writing signed by them shall be conclusive and binding on the disputing parties

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both with respect to the matters in dispute, and all expenses of the reference and award. The agreement to refer shall not be revocable by either party, and for the purpose of enforcing any award by attachment or otherwise, these conditions and any contract referring thereto, and also the memorandum of the appointment of the arbitrators, may be made a rule of any of the Supreme Courts of Law." The plaintiffs did not attend the arbitration. The arbitrators, appointed by the president of the association as is above mentioned, awarded that the defendants were not responsible as principals for any damages recoverable by the plaintiffs against the sellers under the contract. The arbitrators proceeded upon an alleged custom existing at Liverpool, that if brokers disclosed the names of their principals, the brokers should not be liable on the contract.

At the trial before Hawkins, J., the jury found that the alleged custom did not exist, and judgment was entered for the defendants.

The plaintiffs appealed.

June 27. *Bigham, Q.C.*, and *Gorell Barnes*, for the plaintiffs. The defendants having signed the contract, are bound by it, the addition of the word "brokers" is immaterial. If the liability of the defendants is to be viewed as a question of fact, it is to be remarked that it is unlikely that the plaintiffs would enter into a contract with unknown persons, and would exonerate from liability the defendants with whom they were actually dealing. But the question between the parties really depends upon the true construction of the written contract. *Southwell* v. *Bowditch* (1) is not an authority against the plaintiffs: the language of the contract in that case was different from the words used in the present.

Henn Collins, Q.C., and *French*, for the defendants. The question is whether upon the true construction of the contract the defendants have rendered themselves personally liable: *Gadd* v. *Houghton* (2); and by the addition of the word "brokers" it is manifest that they intended not to bind themselves to the fulfilment of the terms of the contract. *Fleet* v. *Murton* (3) is

(1) 1 C. P. D. 374. (2) 1 Ex. D. 357.
(3) Law Rep. 7 Q. B. 126.

distinguishable from the present case; there no arbitration clause existed. In the present action the arbitrators have decided in favour of the defendants: their decision was based upon a custom alleged by the defendants to exist, whereby a broker is absolved from liability when he gives up the name of his principals. This being the ground of the arbitrators' decision, the custom must be taken to be good and valid, even although the jury have found that it did not exist.

Gorell Barnes, in reply. The plaintiffs and the defendants have made a contract, upon which the defendants are liable according to law, and the arbitrators had no jurisdiction to say that the defendants were not responsible to the plaintiffs. The arbitrators had no authority to insert in the contract what is really a new term. In order to set the defendants free from their primâ facie liability, the alleged usage relied upon must be reasonable: *Grissell* v. *Bristowe* (1); *Maxted* v. *Payne* (2); but in truth it is most unreasonable.

Cur. adv. vult.

Aug. 8. The following judgments were delivered:—

BRETT, M.R. This case was tried before Hawkins, J., who entered judgment for the defendants. The action was brought against the defendants in respect of an alleged breach of contract in the purchase and sale of certain produce. They had in fact made the compact; but they were in reality brokers, and they signed the contract in this form, "W. Eaton and Son, brokers." The contract is in this form: "Messrs. Hutcheson & Company. We have this day sold to you the following goods:—the cargo of 500 tons more or less (in bags) of American decorticated cotton-seed cake." The first point taken on behalf of the defendants was that upon this contract, the defendants having signed as brokers, they were not personally liable. But according to the authorities, as I understand them, where the contract is drawn up in this way, and the signature is of the name of the persons with "brokers" added, and the contract is not signed "as brokers," they are personally bound; for it is said to be a signature on their own behalf, and the word "brokers" is only a description. The action was fully tried before Hawkins, J.,

(1) Law Rep. 4 C. P. 36. (2) Law Rep. 6 Ex. 132.

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and the defendants set up a custom, that although they had signed this document so as to make themselves on the face of it personally liable, yet there was a custom of the trade upon such a contract as this, that if they disclosed the names of their principals they were no longer liable. I will not enter into the question whether that evidence was admissible or not. The jury found against the alleged custom. That settles that matter, even if it were a proper question for the decision of the jury. But then the defendants set up an award made by arbitrators, which award was to the effect that they were not personally liable. It was stated, and not denied, that the arbitrators had not entered upon any inquiry as to the quality of the goods, or as to whether they were equal to the contract. They had not decided any point of that kind; but they, either upon evidence before them, or upon their own knowledge—it does not appear which—came to the conclusion that the custom existed which, the jury found, did not exist, and that upon that custom, and upon that alone, the defendants were not liable. Now, the arbitration took place under what is called the arbitration clause in this contract, which is to the effect that if any of the goods should turn out not to be equal to the quality specified, they were to be taken at an allowance, which allowance, together with any dispute arising on the contract, was to be settled by arbitration. It is urged on the one side that those words gave the arbitrators jurisdiction and authority to decide whether the alleged custom was, or was not, part of the contract. Upon the other side it is urged that they could not enter upon that question, that the question of the existence of the custom really went to their jurisdiction, that it was not a question whether the terms in the contract included any particular quality of goods, but that it was really a question whether something not expressed in the contract could be added to it, that is in fact, whether a custom could be added to the contract. Now, the question is, had they any jurisdiction to inquire into the existence of that custom or not? Can a question, whether a custom is to be added to the written contract, and thus to control the meaning of this contract, be held to be "a dispute arising upon this contract"? It seems to me that it cannot. Then if it cannot, what have the arbitrators done? The

arbitrators have assumed to decide, and have only decided something which they had no authority to decide, and they have wholly refused to consider, or to decide, that which was within their jurisdiction. If that be a true proposition, it seems to me that what they have decided they have decided without jurisdiction, and they having declined to exercise the only jurisdiction which they had, the award cannot be supported on any ground, and that it is a mere nullity as between the plaintiffs and the defendants in this case. It is not a case where an arbitrator has assumed to decide something within his jurisdiction, and where he is alleged to have decided it wrongly. It is not a case where an arbitrator has assumed to decide something within his jurisdiction, and is alleged to have misconducted himself with reference to it. I apprehend that in such cases as those the award would be binding, and that if the plaintiffs objected to the award on either of those grounds, they must have moved to set it aside, and they could not dispute its validity when relied upon as a defence to an action. But if an arbitrator assumed to decide something over which he has no jurisdiction, and absolutely declines to decide the only thing over which he has jurisdiction, it seems to me that the award is an absolute nullity, and that it cannot be set up as a defence to an action. It seems to me, therefore, that the question which the arbitrators have dealt with has not been any question as to the application of the written contract to the goods delivered in alleged pursuance of the contract: they have not dealt with the contract as contained in the paper on which it was written, but they have dealt with another matter, and that other matter was not a "dispute arising out of the contract," but was really a dispute as to what was the contract. The only matter which they had authority to decide was any question arising on the contract itself, but they have taken on themselves to decide what the contract was, in order to give themselves jurisdiction to decide what the rights of the parties were. As far as I am aware, no case has decided that an arbitrator who has authority to decide a dispute arising on such a contract as this which is specified and described, has also authority to say what the contract is, in this sense, that he has a right to add something to the contract which is not expressed in it. I think he

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cannot do that. What the arbitrators have really done here, is by their own decision to attempt to give themselves a jurisdiction which otherwise they had not. I think that there is no evidence here of any such custom as that set up by the defendants, and, therefore, that upon that issue which the jury have found for the plaintiffs, the plaintiffs are entitled to succeed.

BOWEN, L.J. I am of the same opinion. In regard to the point whether upon such a contract as this signed by parties describing themselves as brokers the persons signing are bound as principals, I have nothing to add to what has been already said by the Master of the Rolls. But the defendants have set up this curious defence, that there was an arbitration clause, as it is called, in this commercial contract, and they maintain that there have been an arbitration and an award under that clause. There certainly has been a professed arbitration, and there has also been an apparent award which decided in favour of the defendants as to the question of liability. The award decided the question of liability in their favour on this ground; that there was a custom to the effect, that if the defendants, who bound themselves by the contract, disclosed the names of their principals, there was to be a novation, so to speak, of the contract, whereby the defendants were to be relieved from liability and there was a substitution of others as principal debtors. The arbitrators decided that there was such a custom as I have mentioned, and that that custom was to be read into the contract, and therefore they discharged the defendants from all claim. It is said on behalf of the plaintiffs that the arbitrators had no jurisdiction to decide that question. Is a dispute as to the existence of the custom a dispute "arising on the contract"? First of all, be it observed that no such custom exists at all. That has been decided by the jury. What, therefore, the defendants must maintain is this, that the arbitrators had power to read into the contract a non-existing custom, on the ground that they thought it did exist, and then on the faith of that supposed custom to discharge the defendants from the contract. Is that a decision of any dispute or question "arising on the contract"? Now in dealing with the arbitration clause and in interpreting it

in as liberal a sense as we can, bearing in mind, at the same time, that it is a clause that seeks to oust the jurisdiction of the Courts of law, it is to be observed that the dispute "arising on the contract" is mentioned uno flatu with other specific matters of dispute, which do clearly arise on the contract. I am not quite sure whether or not the character of the dispute really intended to be referred was not a dispute as to the performance of the contract, or the carrying out of the contract, and not such a dispute as would operate to put an end to the contract altogether. But the parties to a dispute may, (and commercial men often do,) refer questions of construction of documents which are matters of law and not matters of fact, and I will assume that the interpretation of this clause would not exclude disputes on the interpretation of the contract; nevertheless the question arises, is this a dispute on the interpretation of the contract in such a sense as to be the subject of the arbitration clause? It might be reasonable to say that it was such a dispute, if there were an existing custom in the market, and the question were whether it was to be incorporated into the contract or not. But can it be said that this clause is to be interpreted so as to read into the contract a wholly non-existent custom? If arbitrators might decide that, I do not know why arbitrators might not read anything into a contract, in order to give themselves jurisdiction, and by that means they might decide anything on the ground that there was a custom which governed the matter, though in fact there was none. The question is, can an arbitrator find a custom that does not exist, in order to give himself jurisdiction, and to discharge parties who have entered into the contract on the assumption that no custom is to be read into it? It is not a question of construction of the contract, but it is a question of altering a contract and even construing it after it has been violently altered. On these grounds, though feeling great reluctance to interfere with the decision of Hawkins, J., who decided in favour of the defendants, I cannot help coming to the conclusion that the defendants here cannot set up this award as a defence.

FRY, L.J. On the material question in this case I have the misfortune to differ from my learned Brethren. The defendants

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allege that the contract in question was affected by a custom, and that that custom was this, that if a broker, acting as broker but contracting as principal, discloses the name of the principal before the time of performance arrives, the broker is relieved from personal liability on the contract, and the real principal alone becomes liable. Such a custom has been found by the arbitrators in this case to exist, and to have furnished a ground of discharge for the defendants. The jury have negatived the existence of that custom; but I do not feel myself at liberty to have regard to their decision as overruling the decision of the arbitrators, because, in the view which I take, the arbitrators were persons chosen by the contracting parties to decide that question; and therefore it appears to me, with great deference, that to approach that question by asserting that the custom did not exist and therefore the arbitrator could have no jurisdiction, is to beg the question, because, if the arbitrators had the authority, it was a matter for them and not for the jury. Therefore I think that the question must be asked in this manner: Is a dispute with regard to a custom of that sort, supposing it to exist, a "dispute arising upon this contract" within the meaning of the words of the contract? Now it appears to me that before an arbitrator can determine a dispute upon the contract he must be able to determine what is the contract, because otherwise it is impossible to determine the rights of the parties on the contract. Therefore in my judgment, the first matter for decision by the arbitrator must be, what is the contract. In every case in which the contract is coloured by custom, it must be necessary for the arbitrator to determine what is the custom which so affects the contract, and therefore it must be competent for him, whenever the dispute arises upon the contract, to ascertain the true interpretation of the contract, having regard to all the surrounding circumstances and having regard to all customs, if any, which affect the construction or alter the terms of the contract. In the present case the custom set up does affect the terms of the contract. It appears to me that the dispute arises upon the contract as so affected by custom. Now, is that a "dispute arising upon the contract"? To my mind, the words "dispute arising upon the contract" plainly embrace such a dispute as the

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one which I refer to, a dispute as to whether the defendants are or are not under existing circumstances liable upon it. It is suggested that those words may be limited in application by reason of the context, and that because they occur together with the word "allowance," they must be taken as ejusdem generis with that word. Now I think that that doctrine of cutting down the plain meaning of words because they happen to come in connection with others, is one to which recourse should not be too freely had. In the present case it does not appear to me that it applies at all. On the contrary, I rather think that by the terms following the word "allowances," it was intended to indicate that disputes of a much wider description than those already mentioned were to be referred to the arbitrators. I need not say that, differing as I do from the Master of the Rolls and the Lord Justice, I have a strong conviction that I am wrong, but at the same time, as my opinion leads to that which I have expressed, it has become my duty to express that difference of opinion.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Field, Roscoe, & Co., for Bateson, Bright, & Warr, Liverpool.*

Solicitor for defendants: *W. W. Wynne, for H. Forshaw & Hawkins, Liverpool.*

J. E. H.

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May 30.

[IN THE COURT OF APPEAL.]

THE LONDON SCOTTISH BENEFIT SOCIETY *v.* CHORLEY, CRAWFORD, AND CHESTER.

Considered. REED *v.* GRAY [1952] 1 Ch. 337

Solicitor—Defendant in Person—Costs as Solicitor—Taxation.

Where an action is brought against a solicitor who defends it in person and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary.

Judgment of the Queen's Bench Division (12 Q. B. D. 452) affirmed.

APPEAL by the plaintiffs from the decision of Denman, Manisty, and Williams, JJ., refusing a review of taxation.

The facts of the case are fully stated in the report of the proceedings before the Queen's Bench Division (1), and it is here only necessary to state that the defendants, Crawford & Chester, who were solicitors, were successful parties, and upon presenting their bill of costs for taxation it was objected that they ought not to be allowed any other costs than costs out of pocket, or such costs as they would be entitled to if they were non-professional men. The master overruled the objection, and a summons to review the taxation was referred by Mathew, J., to the Divisional Court. After argument, the Queen's Bench Division dismissed the appeal from the master's decision (1).

May 14. *Alfred Cock*, for the plaintiffs. The first question is whether any practice exists whereby solicitors, who are themselves parties to actions, are allowed different costs from those allowed to an ordinary litigant. The text-books shew that formerly, at least, the practice did not exist. The right to costs was created by the Statute of Gloucester, 6 Edw. 1, c. 1, and in commenting upon this statute it is said in 2 Inst. 288, that the party to a suit is not entitled to the costs and expenses of his trouble and loss of time. And it does not appear from Sayer's Law of Costs, 2nd ed. (1777), that at the time of publishing that work any difference existed between an attorney and an

(1) 12 Q. B. D. 452.

ordinary litigant. In Hullock on Costs, 2nd ed. (1810), p. 3, it is said that "the plaintiff is not to be allowed, in his costs, money expended on account of himself, or for the loss of his own time;" and no exception is here made in favour of a solicitor. The rule is stated in favour of the defendants in Dixon's Lush's Practice, 3rd ed., p. 896; but no authority is given. A similar statement is contained in Chitty's Archbold's Practice, 12th ed., p. 80; but the only authorities there given are *Jervis* v. *Dewes* (1); *Parsloe* v. *Foy* (2); *Leaver* v. *Whalley* (3); and these cases really are not in the defendants' favour. It is said in Pulling's Law of Attorneys, ch. 8, part 1, sec. 1, p. 267 (3rd ed.), that "a litigant who dispenses with professional assistance, is, under ordinary circumstances, only entitled to his costs actually out of pocket, and not generally to remuneration for his own services; a rule, however, which allows of an exception in the case of an attorney or solicitor acting on his own behalf." But only the three cases last mentioned are cited in support of the latter portion of this proposition. The present question does not appear to be treated of in Gray on Costs, or in Morgan and Wurtzburg on Costs. The nearest analogy to the present case is that of a barrister, who, if he is a litigant and draws his own pleadings, will not be allowed the costs of so doing, for costs are only an indemnity. Where a mortgagee acts as his own solicitor in a suit in defence of his own title, he will be allowed, as against a second mortgagee, his costs out of pocket, but no other costs: *Sclater* v. *Cottam* (4); and the authority of this decision has not been shaken by *Price* v. *M'Beth* (5). The case last named is the nearest approach to an authority in favour of the defendants. It is unnecessary to consider how far a solicitor who is a trustee is entitled to costs, for the right to them goes upon special principles. Moreover, it appears that the practice of the taxing masters is not uniform.

But, secondly, if the practice relied upon by the defendants does exist, it is vicious in principle and ought to be disregarded. There can be no difference upon taxation of costs between a

(1) 4 Dowl. 764.
(2) 2 Dowl. 181.
(3) 2 Dowl. 80.
(4) 3 Jur. (N.S.) 630.
(5) 33 L. J. (Ch.) 460.

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skilled party and an unskilled party who is a litigant. The principle upon which costs are allowed is, that a successful party is to be indemnified against the unjust litigation, and not that he is to be remunerated in consequence of it. The plaintiffs object to the allowance of any costs to the defendants, Crawford & Chester, except costs out of pocket or such (if there are any) as a non-professional man would recover. The policy of the law has always been to restrict the expenses of litigation, as is plain by the passage cited from Fleta, in 2 Inst. 288, note 10, and the defendants in truth are claiming those which are not legal costs.

H. Tindal Atkinson, for the defendants. It is admitted for the defendants that a solicitor cannot claim costs for instructing himself; but the defendants are entitled upon taxation to "Instructions for Brief": it is a technical term, and it includes the expense of getting up the case and of procuring the attendance of witnesses. The rule is correctly laid down in Dixon's Lush's Practice, 3rd ed., p. 896, and the modern text-books substantially agree with the doctrine there stated. In *Ex parte Chamberlayne, In re West* (1), a solicitor was the petitioning creditor for a fiat in bankruptcy, and acted on his own behalf as solicitor, and he was allowed by Knight Bruce, V.C., his full costs out of the estate. *Price* v. *M'Beth* (2) is really a decision in the defendants' favour. If solicitors who are themselves parties to an action, are to be disallowed ordinary costs, when they act on their own behalf, the practice will render litigation more expensive, for a solicitor will not conduct his own case, but will employ another solicitor, and costs will be incurred which otherwise will be avoided.

Alfred Cock, in reply. *Jervis* v. *Dewes* (3) is to be explained on the ground that what was done by the defendant, an attorney, was considered to have been done by him through his agent, whose name was on the record. *Ex parte Chamberlayne, In re West* (1), is hardly to be regarded in the light of a judicial decision.

Cur. adv. vult.

(1) 14 Jur. 997. (2) 33 L. J. (Ch.) 460.
(3) 4 Dowl. 764.

May 30. The following judgments were delivered :—

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BRETT, M.R. An action was brought against solicitors, who defended in person, and who were ultimately held to be entitled to judgment with costs. They claimed to have their costs taxed as if they had been acting for a client, that is, a different person. The question is whether this view can be maintained. It was contended for the plaintiffs that there is no difference as regards the right to costs between a solicitor and an ordinary person; and for the defendants it was contended that the costs of a solicitor, who is party to a suit, ought substantially to be taxed as if he had been acting for a different person. I think neither contention correct. I cannot think that any privilege of a solicitor exists. I am wholly unable to agree to any argument standing upon that footing. I should have thought that a person wrongfully brought into litigation ought to be indemnified against the expenses to which he is unjustly put; but there cannot be a perfect indemnity, because it is impossible to determine how much of the costs is incurred through his own over-anxiety. When an ordinary party to a suit appears for himself, he is not indemnified for loss of time; but when he appears by solicitor, he is entitled to recover for the time expended by the solicitor in the conduct of the suit. When an ordinary litigant appears in person, he is paid only for costs out of pocket. He cannot himself take every step, and very often employs a solicitor to assist him: the remuneration to the solicitor is money paid out of pocket. He has to pay the fees of the court, that is money paid out of pocket; but for loss of time the law will not indemnify him. When, however, we come to the case of a solicitor, the question must be viewed from a different aspect. There are things which a solicitor can do for himself, but also he can employ another solicitor to do them for him; and it would be unadvisable to lay down that he shall not be entitled to ordinary costs if he appears in person, because in that case he would always employ another solicitor. If a solicitor does by his clerk that which might be done by another solicitor, it is a loss of money, and not simply a loss of time, because it is work done by a person who is paid for doing it. It is true, however, to say that the costs of a solicitor appearing in person must be taxed differently from those of an ordinary

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litigant appearing by a solicitor. The unsuccessful adversary of a solicitor appearing in person cannot be charged for what does not exist, he cannot be charged for the solicitor consulting himself, or instructing himself, or attending upon himself. The true rule seems to be that when a solicitor brings or defends an action in person, he is entitled to the same costs as an ordinary litigant appearing in person, subject to this restriction, that no costs which are really unnecessary can be recovered. Of this kind are the costs of instructions and attendances. None of the text-books have laid down a different rule from that which I have enunciated, and a uniform practice has not prevailed amongst the masters. This is an appeal from the decision of the Queen's Bench Division reported in 12 Q. B. D. 452; the judgments are there reported, and it seems to me that the head-note of the report accurately expresses the law: it states nearly the same principle that I have laid down. The judgment of the Queen's Bench Division was substantially right, and the principle involved in it is accurately stated in the head-note of the report in the Law Reports. The taxation perhaps was not conducted upon a proper principle; the defendants' bill of costs must go back to the master to be reconsidered, and the items therein charged must be allowed according to the principle laid down in this judgment. We will reserve the question as to costs.

BOWEN, L.J. I agree with the reasoning and with the decision of the Master of the Rolls. A great principle, which underlies the administration of the English law, is that the courts are open to everyone, and that no complaint can be entertained of trouble and anxiety caused by an action begun maliciously and without reasonable or probable cause; but as a guard and protection against unjust litigation costs are rendered recoverable from an unsuccessful opponent. Costs are the creation of statute. The first enactment is the Statute of Gloucester, 6 Edw. 1, c. 1, which gave the costs of the "writ purchased." There is a passage in Lord Coke's Commentary, 2 Inst. 288, which it is worth while to examine, as it affords a key to the true view of the law of costs. That passage is as follows: "Here is express mention made but of the costs of his writ, but it extendeth to all the legal cost of

the suit, but not to the costs and expenses of his travel and loss of time, and therefore 'costages' cometh of the verb 'conster,' and that again of the verb 'constare,' for these 'costages' must 'constare' to the court to be legal costs and expenses." What does Lord Coke mean by these words? His meaning seems to be that only legal costs which the Court can measure are to be allowed, and that such legal costs are to be treated as expenses necessarily arising from the litigation and necessarily caused by the course which it takes. Professional skill and labour are recognised and can be measured by the law; private expenditure of labour and trouble by a layman cannot be measured. It depends on the zeal, the assiduity, or the nervousness of the individual. Professional skill, when it is bestowed, is accordingly allowed for in taxing a bill of costs; and it would be absurd to permit a solicitor to charge for the same work when it is done by another solicitor, and not to permit him to charge for it when it is done by his own clerk. The question before us does not depend on the privileges of a solicitor. My judgment is the same as that of the Master of the Rolls; the costs claimed, subject to the exceptions which have been mentioned, ought to be allowed, because there is an expenditure of professional skill and labour. Is the rule which we lay down in conflict with the existing practice? I think that it is not; and it is some corroboration of our view that in Dixon's Lush's Practice, 3rd ed., p. 896, the rule is laid down in similar terms to those in which we state it; it is there said that "an attorney regularly qualified is allowed to make the same charges for business done when he sues or defends in person, as when he acts as attorney for another." The late Lord Justice Lush was a very great master of practice, and his view as to the costs payable to a solicitor who appears in person and is successful is the same as ours.

FRY, L.J. I am of the same opinion. This is not a question as to a solicitor's privilege. I think that the conclusion at which we have arrived will be beneficial to the public, because if the rule were otherwise a solicitor who is party to an action would always employ another solicitor, and whenever he is successful he would recover full costs; whereas under the rule of practice

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laid down by us, a solicitor who sues or defends in person will be entitled, if he is successful, to full costs, subject to certain deductions, of which his unsuccessful opponent will get the benefit.

. . . . . .

Appeal dismissed. (1)

Solicitors for plaintiffs: *Harries, Wilkinson, & Raikes.*

The defendants in person: *Crawford & Chester.*

J. E. H.

July 12.

[IN THE COURT OF APPEAL.]

BOARD OF WORKS FOR THE PLUMSTEAD DISTRICT, APPELLANTS; SPACKMAN, RESPONDENT.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—"*General Line of Buildings*"—*Certificate of Superintending Architect, Effect of.*

In a proceeding before a magistrate under the Metropolis Management Amendment Act, 1862, s. 75, for erecting a building, without the consent of the Metropolitan Board of Works, beyond the general line of buildings in the street, the certificate of the superintending architect of that board is absolutely conclusive, and the magistrate is not entitled to judge for himself, whether the line fixed by the certificate be in fact the general line of buildings in the street.

So *held* by Bowen and Fry, L.JJ., Brett, M.R., dissenting.

CASE stated under 20 & 21 Vict. c. 43, and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, by a metropolitan police magistrate sitting at Greenwich.

On the 9th of March, 1883, a summons was issued in the police court for the district of Greenwich, on the prosecution of F. F. Thorne, a surveyor of the Plumstead District Board of Works, against A. J. Spackman, for that on the 15th of January, 1883, and on divers other days, he unlawfully did erect or raise a building, structure, or erection in or on the north side of a

(1) July 2. The taxation having gone back to the Master, and the case having been restored to the list by order, the question of the costs of the appeal came before the Court of Appeal. It appeared from the master's report that a substantial sum had been struck off the bill of costs of the defendants, Crawford & Chester.

Alfred Cock, for the plaintiffs.

H. Tindal Atkinson, for the defendants, Crawford & Chester.

THE COURT (Brett, M.R., Bowen and Fry, L.JJ.) held that there must be no costs of the appeal.

certain street, place, or row of houses, called Newton Terrace, High Road, Lee, in the county of Kent, and adjoining or forming part of the premises known as No. 7, Newton Terrace, of which he was the owner, without the consent in writing of the Metropolitan Board of Works, and beyond the general line of buildings in such street, place, or row of houses, as decided by the superintending architect to the Metropolitan Board of Works for the time being, contrary to the 75th section of the Metropolis Management Act, 1862.

On the 30th of March, 1883, the summons came on for hearing, and the following facts were either proved or admitted.

The defendant was the owner of the house and premises, No. 7, Newton Terrace, mentioned in the summons. This house formed one of a terrace of nine houses (seven of which belonged to the defendant), in the High Road, Lee, known as Newton Terrace. The frontage of the house mentioned in the summons as well as the line of frontage of the other houses of the terrace, did not exceed fifty feet in distance from the High Road. The defendant had, on or about the date mentioned in the summons, without obtaining the consent of the Metropolitan Board of Works (which consent had in fact been refused,) commenced to erect and had proceeded with the erection of a building upon the forecourt of No. 7 Newton Terrace, thereby extending the frontage of that house to the High Road. The complainant thereupon wrote a letter to the defendant requiring him to desist from the erection. The defendant replied declining to do so, and on the 22nd of February, 1883, the complainant again wrote threatening proceedings against the defendant, as soon as his board should have obtained the certificate of the superintending architect of the Metropolitan Board of Works deciding the position of the general line of buildings of which the said premises formed part, in accordance with the 75th section of the Metropolis Management Act, 1862. On the 15th of February, 1883, the complainant, representing the Board of Works, and the defendant both attended by appointment before G. Vulliamy, the superintending architect of the Metropolitan Board of Works, and were both heard by him with reference to the position of the line of buildings, and afterwards G. Vulliamy

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published his certificate. The certificate recited the Metropolis Management Act, 1862, s. 75, and also recited that the complainant, F. F. Thorne, the defendant, A. J. Spackman, and W. Wallen, a surveyor, had severally appeared before G. Vulliamy and been heard regarding the erection of a shop in front of No. 7 Newton Terrace, High Road, Lee, and beyond the face or front of the buildings, forming a row of houses on the northern side of the High Road between Brandram Road and the grounds attached to Hurst Lodge, and that G. Vulliamy had been required to decide the general line of buildings in such road, as provided in the statute above-mentioned. The certificate then stated that G. Vulliamy, being the superintending architect to the Metropolitan Board of Works, did thereby, pursuant to the said Act decide that the main front of the buildings forming the row of houses aforesaid was the general line of buildings on the north side of the High Road between Brandram Road and the grounds attached to Hurst Lodge. Brandram Road was to the east of Newton Terrace, and Hurst Lodge was to the west thereof. The row of houses on the northern side of the High Road between Brandram Road and the grounds attached to Hurst Lodge, mentioned in G. Vulliamy's certificate, consisted of the nine houses known as Newton Terrace, and of about four houses to the east thereof and six houses to the west thereof. A road called Belgrave Villas ran northwards at right angles to the High Road and two of the six houses last-mentioned were left to the east thereof and four of them to the west thereof. Upon the south-east corner of the ground surrounding Hurst Lodge and abutting on the High Road was a wooden structure upon brick foundations, consisting of a stable with coach-house and dwelling-rooms above and used by the occupiers of Hurst Lodge. This stable was at the spot at which the general line of building laid down by the certificate ended, and was the only building between that spot and the grounds of Hurst Lodge which extended for a considerable distance along the High Road, and the building, which was an old building, projected as much as the defendant's new building did. To the east of Brandram Road, and also of the spot for which the superintending architect had proposed to lay down a general line, there was a chapel, which abutted on the High

Road and projected in front of the building line laid down as much as the defendant's new building did, and immediately to the east of the chapel was a row of twenty houses and shops, all of which abutted on the High Road. The erection put up by the defendant in front of No. 7, Newton Terrace, extended considerably beyond the general line of buildings as fixed by the superintending architect to the Metropolitan Board of Works in his certificate, but not beyond the line of the stable, chapel, and shops before mentioned.

It was contended by the counsel who appeared for the complainant:—

(1.) That the position of the general line of buildings within the meaning of the 75th section of the Metropolis Management Act, 1862, was the line fixed and decided to be such by the superintending architect, and that it was not open to the magistrate for the purpose of deciding the question raised by the summons, and by way of reviewing the architect's decision, to draw any new line of buildings, or to alter, or redefine the line fixed by him.

(2.) That in the event of the magistrate's deciding that it was open to him to review and determining to review the architect's decision, the "general line of buildings" within the meaning of the said section did not mean the general line of buildings of all the houses on the north side of the High Road Lee, but meant the line of buildings forming Newton Terrace or of the houses between Brandram Road and Belgrave Villas, or at most of the houses between Brandram Road and the boundary of Hurst Lodge, and that the magistrate was bound as matter of law to confine his attention to the said limited portions of the High Road, and could not take into consideration the buildings east and west of the said portions.

It was argued on the part of the defendant by the counsel representing him, that the magistrate was bound before deciding the summons adversely to the defendant, to determine for himself the general line of buildings, and to find as a fact what was the position of the general line of buildings of the High Road at and about the part where the defendant's building was, and the magistrate ought not to convict the defendant, or order the demolition

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of his building, unless it was in the magistrate's opinion as well as in that of the superintending architect beyond the general line of building, and the counsel for the defendant referred to the case of *Simpson* v. *Smith* (1) on the point. The counsel for the defendant further contended that the buildings to the east and west of the particular part to which the certificate of the architect applied, ought to be taken into consideration in deciding on the general line, and that the line, as laid down by the architect was not a general line, but a particular line arrived at by selecting just that portion of the road at which the buildings for the time being happened to stand back, and that the magistrate was not bound as a matter of law to confine his attention to the limited portion of the road suggested by the complainant, and that on the contrary if it was a question of law and not one of fact, the magistrate was bound as a matter of law to take into consideration the buildings east and west.

The magistrate decided against the complainant and in favour of the defendant's contention upon both points of law. The magistrate thought the case of *Simpson* v. *Smith* (1) applicable, and he thought the other question one of fact, and that he was not bound as a matter of law to confine his attention to the portion of the road suggested by the complainant, and he adjourned the hearing to allow of his visiting the premises and deciding for himself the true position of the general line of buildings, and whether it was necessary to take into consideration the other buildings in order to arrive at a general line. After personally visiting the locality of the premises, the magistrate gave his decision that the general line of buildings as defined by the architect was not the true general line of buildings in the street, place, or row of buildings in which the defendant's building was situate, and he held that it was necessary, as contended by the defendant, in order to arrive at a general line, to take into consideration the position of the stable, or of the other buildings to the east of Brandram Road above-mentioned, or all of them, and after full consideration of all the facts the magistrate decided that the defendant had not built beyond the true general line of buildings. Had the magistrate confined himself to the

(1) Law Rep. 6 C. P. 87.

houses forming Newton Terrace, or to the houses between Brandram Road and Belgrave Villas, or between Brandram Road and the boundary of Hurst Lodge, his decision would have been the same as that of the architect, there being no question whatever that in that particular position no building projected beyond the line laid down by the architect; but in the magistrate's opinion after viewing the spot, there was no ground in fact for selecting that portion of the road and laying down a special line for it, and he therefore dismissed the summons subject to the opinion, of the High Court upon the above case.

If the true position of the general line was a question of fact for the magistrate, he found as a fact that the defendant's building did not project beyond it.

The questions for the opinion of the Court were :—

First, whether the magistrate was bound by the architect's certificate as conclusive, or ought, as he did, to have considered for himself what the true general line of building was.

Secondly, whether he was bound, as a matter of law, in considering the general line of buildings to confine his attention to the portion of the road suggested by the complainant.

If on either question the decision of the magistrate was in the opinion of the Court wrong, the defendant was to stand convicted, and the magistrate was on the case being remitted to him for the purpose to make all further necessary orders on the application of the complainant for the demolition of the buildings.

If the Court, on the contrary, was of opinion that on both points the magistrate's decision was correct, the order dismissing the summons was to be confirmed.

Upon the hearing of the appeal from the dismissal of the summons by the magistrate upon the facts above stated, the judges of the Queen's Bench Division (Lord Coleridge, C.J., Stephen, and Mathew, JJ.), were of opinion that owing to the conflict of the decisions hereinafter mentioned, they were at liberty to adopt their own view of the construction of the Metropolis Management Act, 1862, s. 75, and they held that A. J. Spackman ought to have been convicted by the magistrate of the offence charged in the summons. They granted leave to appeal.

A. J. Spackman appealed.

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June 20, 21, 23. *A. Charles, Q.C.*, and *A. M. Channell*, for A. J. Spackman, the defendant. The question is whether the certificate of the superintending architect to the Metropolitan Board of Works as to the general line of buildings is conclusive in the case of proceedings under s. 75 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), or whether the magistrate is not at liberty to view the premises and determine for himself whether such line is the true line or not. The case of the *Vestry of St. George, Hanover Square* v. *Sparrow* (1) is in favour of the defendant. That case is tantamount to a decision, that such certificate does not preclude the magistrate from determining whether the line fixed by the architect is the true general line or not. *Bauman* v. *Vestry of St. Pancras* (2) will be relied on by the Board of Works; but the only point there decided was that the certificate may be given at any time. The magistrate in that case did not differ from the certificate of the architect, and what is said by the Court as to the architect being the only person who is to determine the line, forms no part of the decision, and amounts only to a dictum. In the next case, *Wandsworth Board of Works* v. *Hall* (3), the magistrate also agreed with the line fixed by the architect being the true line, and so the point which is now before this Court did not arise. The point did arise in *Simpson* v. *Smith* (4), and the Court of Common Pleas approved of and followed their former decision in *Vestry of St. George, Hanover Square* v. *Sparrow* (1), and held that the certificate of the architect, though primâ facie evidence of what was the general line, was not conclusive. So also *Vestry of Paddington* v. *Snow* (5) shews that such certificate is not a condition precedent to finding the general line of buildings. No doubt there must be a general line of buildings, and, in the present case, the real question is what is the nature of the magistrate's duty? It is judicial, and not merely ministerial: he had jurisdiction to consider whether the line of buildings fixed by the superintending architect was correct.

Willis, Q.C., and *Lawson Walton*, for the Board of Works for

(1) 16 C. B. (N.S.) 209; 33 L. J. M. C. 118.
(2) Law Rep. 2 Q. B. 528.
(3) Law Rep. 4 C. P. 85.
(4) Law Rep. 6 C. P. 87.
(5) 45 L. T. (N.S.) 475.

the Plumstead District. The construction of the Metropolitan Management Act, 1862, s. 75, is simple: the duty of the magistrate as to fixing the general line of buildings is only ministerial; but the duty of the superintending architect is judicial, and resembles that of an arbitrator; in the present case he, as appears from his certificate and also upon the facts found by the magistrate, has heard the parties, and his decision cannot be questioned by any tribunal. His certificate is, at least, equal in legal effect to the award of an arbitrator. The magistrate has no jurisdiction to determine the general line of buildings: that must be decided by the superintending architect to the Metropolitan Board of Works, which is an independent and impartial body.

[BRETT, M.R. The magistrate has power to issue a summons and to hear witnesses; no power of that kind is conferred by the statute upon the architect.]

It was intended by the legislature that the Metropolitan Board of Works should enjoy great powers in regulating the streets: and their powers over buildings, such as Spackman's, have been recently much increased by the Metropolis Management and Building Acts (Amendment) Act, 1882 (45 Vict. c. 14), part 2, s. 9. It is unreasonable to suppose it to have been intended that the magistrate should fix the general line of building in a street: he has not the requisite technical knowledge, and is incompetent to determine it.

A. Charles, Q.C., in reply.

Cur. adv. vult.

July 12. The following judgments were delivered:—

BRETT, M.R. In the present case we are called upon to decide an extremely difficult question, and one that has been the subject of much difference of opinion. A summons was issued by the surveyor of the Plumstead Board of Works against Spackman for erecting a building beyond what is called the general line of buildings of the street in which the building was. The superintending architect of the Metropolitan Board of Works had given a certificate as to what was in his judgment the general line of buildings in that street. The summons being taken out before a magistrate, the magistrate himself visited the street, and he

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came to the conclusion that the general line of buildings of the street was not that which the superintending architect had certified, but that it must be drawn further forward; so that, although he was of opinion that if the general line of buildings fixed by the superintending architect was correct and was to be adopted, the defendant's building did go beyond it, yet he was also of opinion, from what he saw, that the defendant's building did not go beyond the true line of buildings. Thereupon he declined to make an order that the building should be pulled down. The objection was taken that the certificate of the architect was conclusive, and that the magistrate had no jurisdiction to question it, and that he was bound to take the line fixed by the architect to be the general line of buildings. The magistrate stated a case for the opinion of the Queen's Bench Division, and that Court has confirmed that contention, and has held that the certificate of the superintending architect to the Metropolitan Board of Works is conclusive, and that upon such a summons as this, when that certificate is once produced, the magistrate has no jurisdiction to question it; that he may inquire into other facts, but that if the line of building is beyond the certified line, then he is bound to make the order to pull down the building. I think it difficult to express the amount of importance involved in this decision. The principle of it comprises such a state of things as this: A man builds a house upon his own land, and he builds it to a certain extent forwards, that is, towards the roadway of a street. It may be that in truth and in fact, and as everybody afterwards would be of opinion upon seeing the place, he has not built it beyond the real line of buildings of the street, that, in truth and in fact, he has merely used his own property and has not contravened that which is the real object of the statute; and it may be that the architect, as has been suggested in former cases, either has taken somewhat too strictly a mathematical view of the matter, or has made a mistake. It may be that he himself would be ready to acknowledge that he has made a mistake. And yet it is contended that the magistrate, by this legislation, is bound to order a person who has built his own house, at his own cost, on his own land, to pull it down, and that the first legal tribunal before which the case comes,

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is bound to make an order and to do a great injustice. It may be that that is the law. If that is the true interpretation of the statute, if there are no means of avoiding such an interpretation of the statute, a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigour of mind that he has, against such an interpretation of an Act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended. The case depends, therefore, upon what is the construction of the 75th section of 25 & 26 Vict. c. 102. The words are, no doubt, to my mind capable of the strict construction to which I have alluded; but it seems to me that the Court of Common Pleas in the year 1864, having to consider that matter, acted upon the following rule of interpretation of statutes, namely, that when the words of an Act of Parliament, being read in their ordinary meaning, are capable of an interpretation which will work manifest injustice, yet if it is possible within the bounds of any grammatical or reasonable construction to read the Act so that it will not commit a manifest injustice, the Court ought to construe it upon the assumption that the legislature did not intend, by the words that it has used, to enact that which will perpetrate a manifest injustice; and it seems to me that the Court of Common Pleas acted upon that rule of interpretation in construing the 75th section. The section was afterwards brought before the Court of Queen's Bench at the time when Cockburn, C.J., presided. He thought himself bound to give an opinion (he did not give a decision,) that the wording of this section was so clear that, even although it did work that injustice which I have described, nevertheless it must be interpreted to have done so. The same question was afterwards brought again before the Court of Common Pleas in *Wandsworth Board of Works* v. *Hall* (1), and I myself at that time was a member of that Court; Willes, J., was a member of that Court when it heard the case; Keating, J., was also a member of the Court; those were two of the judges who heard the former case in the Common Pleas; I myself was

(1) Law Rep. 4 C. P. 85.

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the third judge on that occasion. The question again arose before the Court of Common Pleas in *Simpson* v. *Smith* (1), when Bovill, C.J., presided, and Willes and Montague Smith, JJ., were present on the bench and I myself was the fourth judge. The Court of Common Pleas had before it this statute and this section; it had before it all the observations that had been made by the Lord Chief Justice in the Court of Queen's Bench; it had the cases argued before it, and every point was taken in those cases which has been taken in the argument before us, and I venture to say that not one single argument or point has been added in this argument before us to the arguments which were then used before that Court. I can testify that the Court of Common Pleas took the most anxious pains to consider all the objections that had been raised by the Lord Chief Justice of the Queen's Bench, Sir Alexander Cockburn; they took the utmost pains again to consider the statute; they took the utmost pains again to consider the rule; they again laid down the rule of interpretation which I have endeavoured to express to-day; they applied it to this section, and they again gave deliberate judgments that the legislature did not mean to make the certificate of the architect conclusive upon the first Court of law to which the case is taken, so as to force that Court against its own conviction and against all the evidence which might be brought forward, to make an order to pull down the building which was already erected with the owner's money on his own property. But how did they come to the conclusion that it was manifest injustice to hold that the certificate of the architect in such a case was conclusive? They came to it, first of all, for the reasons which I have given, namely, that it could hardly have been intended to make the superintending architect the sole arbitrator without appeal as to an important right of property exercised by a man on his own land. They came to that conclusion that it could hardly have been conceived that the legislature would allow an interference with property without appeal, when upon almost every trivial case of right there is an appeal, even from one Court of justice to another. But they looked through the Act carefully to see under what circumstances, according to the statute interpreted in the ordinary way, the superintending architect could

(1) Law Rep. 6 C. P. 87.

give his certificate; and looking carefully through the Act, they could not find a single sentence which declared that the architect must hear either the parties or the evidence before he came to a conclusion. They looked through the Act and they found that it was, according to any ordinary rule of interpretation, in vain to suppose that the certificate was necessarily to be given before a building in dispute was actually built and finished. They therefore came to the conclusion (and I can see no answer to the argument,) that if the view (which has been adopted by the Divisional Court,) is to be maintained, after a man has built his house at his own cost upon his own land, after that is finished in the sight of everybody, an application may be made to the architect sitting in his own room, and that, without hearing either of the parties, without hearing any evidence, upon his own mere view, or even without a view if he assumes to have knowledge of the locality, he may lay down and certify for that particular occasion that a certain line of buildings is the regular line of buildings of the street, and that upon that certificate a man's dealing with his own property must be annulled and all the expense must be absolutely thrown away, and that which is his own must be, by an order of a magistrate upon that certificate alone, pulled down. I know that it was urged before us that by the decision of the Divisional Court, if it is upheld, the superintending architect is an arbitrator, and that it follows from that, that he must hear the parties, and so the supposed injustice is done away with. In my opinion that is as clear a petitio principii as can exist. We are trying to find out whether the man is an arbitrator or not, reasons are given to shew that he could not have been intended to be an arbitrator; upon which it is alleged that he acts as an arbitrator, and it is contended that he is constituted an arbitrator by the Act of Parliament, although a provision constituting him cannot be found. That is a mode of argument which I cannot adopt. It was suggested before the Court of Common Pleas, and it was overruled. It will hardly be expected that after having myself argued *Vestry of St. George, Hanover Square* v. *Sparrow* (1) before the Court of Common Pleas, after having therefore had every opportunity of inquiring into the matter and considering

(1) 16 C. B. (N.S.) 209; 33 L. J. M. C. 118.

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it then, after hearing the judgments of those learned judges in the first case, and after having heard their arguments amongst each other in the second and third, and after having become convinced that their judgments were right for the reasons which they gave upon the same arguments now urged without one single addition, my opinion should be changed, and that I should think that either the rule of construction applied to this statute is a bad rule of construction, or that I should hesitate to apply it to this case. No doubt the words are strong, but the Court of Common Pleas appreciated the strength of the words and dealt with them. I, having heard these arguments again, absolutely adopt what was said in the Court of Common Pleas.

What is the line of buildings, is a reality. The only question is how it is to be determined. Observe what an architect is called upon to do, and to what this interference with property will lead, unless it is held tightly in hand. There may be owners of many plots of land abutting upon that which is intended to be a street, but which is not yet made. All the plots of land come up to the face of the street. The land in a great city or town in this country is of almost inestimable value. It is actually valued by the square foot. Two or three owners of plots think that they would like to have a space between their houses and the street. Thereupon they build their houses back. The moment the architect can see that there is a line of buildings in the street, he can issue this certificate, not so as to give warning to the next owner who is about to build, but after he has built and without hearing him; the architect comes to the conclusion that there is a line of buildings, and thereupon he gives a certificate, upon which the man who has built his house rather more forward is obliged to put it back, and the land in front of his house has become of no value for building purposes. Of course if a house is put ten feet or twenty feet back, all the land in front of it which was up to that moment valuable, has become of no value. Then there is this strange state of things, that the architect having given his certificate in that particular case of what the regular line of buildings is, in the next case brought before him, again without hearing anybody, may change his mind and give a certificate for a different line. It seems to me to be

monstrous. It is said that he is a more competent person than the magistrate, because this is a question of skill to determine what is the real line of the buildings. But it is admitted that the magistrate as to every other point in the case is to have the power of decision. The architect gives a certificate of what the regular line of building is. That regular line of building, although it exists in fact, is a difficult thing to see, and the architect's certificate may be just as difficult to apply. It may be that another architect is wanted to tell how that line of building set down by the architect who gives the certificate, is to be traced on the ground. That seems to me as difficult a question as the other. Then the magistrate, it is admitted, would have to determine how it would apply to the land. It is admitted he must determine whether the house goes beyond or behind the line which is traced on the plan by the superintending architect. It is admitted that he can do every single thing except this one, and I can see no reason therefore in this alleged difficulty of the matter which should induce the legislature, as I say, to commit the injustice of allowing a man's property to be interfered with to this extent without appeal, and without a hearing, and before a person who has nothing to do with the administration of the law.

I have expressed myself forcibly, but I have the strongest conviction in this case; and I am bound to put on record, if I can, my strong conviction, that to hold what the Divisional Court has held, is to hold that the legislature has enacted that which is manifestly an injustice.

Then it was alleged that this might be explained by the fact that the superintending architect is appointed not by the persons who complain, that is, by some vestry or district board, but by the Metropolitan Board of Works, and therefore he is appointed by an independent body. But the legislature has passed an Act, in which they have recognised the power of interference of this very Metropolitan Board of Works. So that that which is said to palliate this injustice, is taken away by this second Act of Parliament, 45 Vict. c. 14, s. 9. Now it seems to me, with regard to this second Act of Parliament, that I have a right to consider that the legislature never would have passed it, unless they had acquiesced in the judgment, which they must have known or are

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to be taken to have known, a judgment twice reiterated in the Court of Common Pleas. It is impossible, to my mind, to think that otherwise the legislature could have passed the second Act of Parliament, in which they may be said to transfer this very power to the Board, which is the authority which nominates and can dismiss the person, upon whose certificate it is said that the complaint is to become absolute and without appeal. I am of the same opinion that I have always been, namely, that the proper and true construction of this 75th section merely gives the power to the architect to make this certificate. It gives him a great power, because if the person who builds, builds within that certificate, his building cannot be challenged by anybody; but it is clear that it does not give this tyrannical effect to it, that if a person builds beyond it, and yet the magistrate who hears the case is not satisfied that it is beyond the real line, the magistrate shall not be able to say that he will not go that length, and will not order the building to be pulled down. I stand by the opinion of the Court of Common Pleas, and think now, as I thought then, that that is the only decision which is consonant with the rights of property in this country, and with general justice between parties.

FRY, L.J. The judgment which I am about to read is that of Bowen, L.J., and myself.

The questions in this case, which has been stated by a metropolitan magistrate, arise on the construction of the 75th section of the statute 25 & 26 Vict. c. 102, which deals with the general line of buildings in the streets and other places in the metropolis. The first question stated by the magistrate is whether he is bound by the architect's certificate as conclusive, or ought to have considered for himself what the true general line of building was. This is a point which has been several times before the Courts prior to the decision now under appeal, and which has elicited a great diversity of opinion. In the cases of *St. George* v. *Sparrow* (1) and *Wandsworth* v. *Hall* (2), eminent judges of the Court of Common Pleas expressed an opinion that the certificate of the architect was not binding on the justice, and in the case of

(1) 16 C. B. (N.S.) 209. (2) Law Rep. 4 C. P. 85.

Simpson v. *Smith* (1) that Court decided the question in accordance with their previously expressed opinion. But, on the other hand, in the case of *Bauman* v. *St. Pancras* (2), Cockburn, C.J., and Mellor, J., criticised the case of *St. George* v. *Sparrow* (3), and expressed the opinion that the certificate of the architect was final and binding on the justice.

In such a diversity of opinion on the point in controversy we think that the Queen's Bench Division were right in considering that they were not precluded by authority from determining the question on its merits. We shall pursue the same course, not regardless of the views enunciated by the various judges who have expressed their opinions, but supported by remembering that in our conclusion, whatever it may be, though we must differ from some great authorities, we must also be in accordance with others.

Before proceeding to the section in question, it is desirable to observe that a general scheme for regulating the buildings in the metropolis was introduced by the Metropolitan Building Act of 1855 (18 & 19 Vict. c. 122); that that Act laid down certain general rules as to buildings, and created a body of district surveyors to give effect to these rules: that it placed the Metropolitan Board in a certain position of headship over the district boards (s. 55 et seq.); that it required the Metropolitan Board to appoint an officer, termed a superintending architect of metropolitan buildings (s. 62), to whom (unless otherwise ordered) the district surveyors were to make returns, and who was to exercise a supervision over the proceedings of the district surveyors and to receive from them the fees paid to them (ss. 54, 65); and that his signature counter-signed by the chairman was made the proper evidence of the board's approval of any plans or particulars (s. 58). Lastly, s. 143 of the statute for the better local management of the metropolis, passed in the same session of Parliament (18 & 19 Vict. c. 120), enabled any vestry or district board to pull down any buildings which projected beyond the regular line of buildings, leaving the question what was such regular line to be determined if necessary by a jury on an action of trespass brought by the

(1) Law Rep. 6 C. P. 87. (2) Law Rep. 2 Q. B. 528.
(3) 16 C. B. (N.S.) 209.

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building owner against the board. In 1862 the Act in question was passed for the amendment of the Local Management Act of 1855. The 75th section repealed the 143rd section of that Act, and also the provision of an earlier Act with regard to one particular road in the metropolis, and then proceeded to deal with two distinct cases, (1) the case of a person building beyond the general line in case the distance of such line of buildings from the highway does not exceed fifty feet; (2) the case of a person building within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet. As the present question arises on the former of these cases, we may omit so much of the section as deals with the second case, and then the enacting words will be as follows: "No building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the board of works for the district in which such building or erection is situate to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint: and, if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable." It appears to us that one line only is spoken of throughout this section, namely, the general

line of buildings: that as regards each case under discussion one decision of that line only is referred to, namely, the decision of the architect, and that decision is to be valid for all the purposes of the section in such case, and the pointed reference to this decision of the architect in the direction to be given by the magistrate, namely, to pull down the whole building, or so much thereof as may be beyond the said general line "so fixed as aforesaid," appears to us to emphasise the proposition, that the decision or fixing of the line by the architect is to be adopted by the magistrate if the rest of the case be made out to his satisfaction. If the architect and magistrate are both to fix the line, it is conceivable that they may fix it differently. If they fix it in the same place, no question can arise; but if they should fix it differently, one or other of two cases must occur. If the architect's line be in advance of the magistrate's, the magistrate cannot act upon his judgment and order the demolition of so much of the building as is in excess of his line; he can order only so much as is in excess of the architect's. If, on the other hand, the magistrate's line be in advance of the architect's, then, according to the contention of the appellant, the magistrate can order only so much of the building to be pulled down as is beyond his own line, whereas the statute speaks of the demolition of so much of the building as may be beyond the said general line as fixed by the architect. These observations seem to us to shew that the statute not only contemplated only one line, but only one decision as to that one line, in each particular case in controversy before the justice. It appears to us that there is nothing unreasonable or improbable in the conclusion, that the power of finally determining this line should be vested in the superintending architect of the Metropolitan Board. He is, as we have already shewn, an officer filling a responsible position under the Metropolitan Board, that board is itself entrusted with large powers of superintendence over the metropolis and over the vestries and districts; the question to be determined is one of a technical character on which the legislature might think an architect as good a judge as a magistrate, and it may have been thought that such a reference was more likely to secure uniformity of decision than leaving the question open to each magistrate

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before whom it might come. It seems to us improbable that the legislature should have contemplated that the same line should be twice decided in each case between the building owner and the board, and that each decision should retain a certain validity, so that if the magistrate's line was behind the architect's the architect's should govern the extent of demolition, and if the architect's line was behind the magistrate's the magistrate's should prevail. The case would have been different if the second decision had been pronounced by way of appeal, and the magistrate who heard the appeal had been authorized to give effect to his decision by demolishing down to the line as ascertained by himself, which as already shewn is not the case. It has been suggested that the legislature are not likely to have required any proceeding before the magistrate if this question was not open to his decision, and if, to use the language of Erle, C.J. (1), he was to act under the command of the superintending architect. But it appears to us that after the architect's decision several questions might arise and require judicial determination. The magistrate might have to determine (1) whether the building complained of was a building, structure, or erection within the meaning of the Act; (2) whether the distance of the line of buildings from the highway was less than fifty feet; (3) whether the superintending architect had fixed the general line of buildings for the case in hand; (4) whether the Metropolitan Board had given any consent; (5) whether that board had imposed any conditions; and, if so, (6) whether these conditions had or had not been broken; (7) whether the thing complained of was beyond the line laid down; and (8) within what time it was reasonable that the demolition should be made. Several points have been raised incidentally as to the time, manner, and character of the decision to be given by the architect. The case before us is not addressed to any question as to the validity or propriety of the decision given by the architect, but only to the duty of the magistrate to reconsider the question for himself, and therefore these points do not require detailed discussion or final decision. It may be enough to observe that in our opinion any duty of deciding the line in question cast upon the architect

(1) 16 C. B. (N.S.) 217.

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ought to be performed by him with a due regard to the interests no less of the building owner than of the public, both as regards the time when the decision shall be given and the mode of arriving at the decision. We cannot think that the silence of the statute on the details of the architect's procedure exonerates him from this obligation, and we think that this obligation would rest on him equally, whether his decision were final or not; for on any construction of the statute his determination of the line is a matter of moment to both parties, as the magistrate can never go beyond it. For these reasons, and notwithstanding the distrust which we always feel when differing from the Master of the Rolls, we are constrained to hold that the decision below was right and that this appeal should be dismissed.

Appeal dismissed.

Solicitor for Plumstead Board of Works: *G. Whale.*
Solicitors for A. J. Spackman: *Saw & Sons, Greenwich.*

J. E. H.

M'ILWRAITH AND OTHERS *v.* GREEN AND ANOTHER.

Aug. 9.

Practice—Payment into Court—Denial of Liability—Action for several Breaches of Contract—Payment into Court in respect of one Breach—Acceptance in satisfaction of all Demands—Costs—Order XXII., rr. 6, 7.

In an action for breach of contract assigning two distinct breaches, the defendants pleaded denying the breaches, and alternatively paid money into court with regard to one of the breaches. The plaintiffs gave notice under Order XXII., rule 7, that they accepted the money paid into court in full satisfaction of the causes of action in the statement of claim:—

Held, that the plaintiffs were entitled, without proceeding to judgment, to their costs of the action.

ACTION for breach of the defendants' contract to construct three hopper barges for the plaintiffs in accordance with a specification. The statement of claim assigned as breaches, first, in not building the barges in accordance with the specification, and by using materials and workmanship of an inferior quality; secondly, in failing properly to pack the first of the barges for shipment, and by delivering the sections and materials for its construction in such a damaged and insecure condition as to

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occasion damage in transit. The plaintiffs claimed as damages 3500*l.*

Defence, after denying the breaches, &c., and admitting part of the statement of claim, in paragraph 7, proceeded: "The defendants say alternatively that if the barges or either of them were constructed of iron plates thinner than required by the contract or specification, which they deny, the plaintiffs have not been damaged in consequence thereof to an extent exceeding 175*l.*, which sum the defendants bring into court, and say that it is sufficient to satisfy so much of the plaintiffs' claim as is herein pleaded to. [The 175*l.* being duly paid into court.]

Upon receipt of the defence the plaintiffs gave written notice that they accepted the 175*l.* paid into court by the defendants "in full satisfaction of the causes of action in the statement of claim mentioned." The plaintiffs thereupon applied to Smith, J., in chambers for an order for the taxation of the plaintiffs' costs of the action, but the learned judge refused the application. The plaintiffs appealed.

Moulton, for the plaintiffs. It must be admitted that *Crosland* v. *Routledge* (1) is in the defendants' favour. There the defendants, in an action upon a bill of exchange, denied liability, but brought the amount of the bill into court. The plaintiff gave notice that he accepted the amount, and applied to tax his costs, but Field, J., at chambers, held that the denial of liability took the case out of the words "in case the entire claim or cause of action is satisfied" in Order XXII., rule 7 (2), and that the

(1) W. N. 1883, 228.

(2) Order XXII., r. 6: When the liability of the defendant in respect of the claim or cause of action in satisfaction of which the payment into court has been made, is denied in the defence, the following rules shall apply:

(*a.*) The plaintiff may accept, in satisfaction of the claim or cause of action, in respect of which the payment into court has been made, the sum so paid in, in which case he shall be entitled to have the money paid out to him as hereinafter provided, notwithstanding the defendant's denial of liability, whereupon all further proceedings in respect of such claim or cause of action, except as to costs, shall be stayed; or the plaintiff may refuse to accept the money in satisfaction, and reply accordingly, in which case the money shall remain in court subject to the provisions hereinafter mentioned.

(*b.*) If the plaintiff accepts the money so paid in, he shall after service of such notice in the form No. 4 in Ap-

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action must proceed to decide whether the plaintiff was entitled to his costs. But here the plaintiffs agree, by their notice, to accept the amount paid in in full satisfaction of their claim, and this is equivalent to satisfaction.

Bucknill, for the defendants. Order XXII., which is in substitution for the repealed Order XXX., has introduced a new practice. The defendants having denied their liability as to one of the breaches, and this denial remaining upon the record, the plaintiffs are not in a position to have judgment upon their whole claim. The action is brought for a large sum of money in respect of two breaches of contract, and the plaintiffs ought not to have their costs of the action merely because they have recovered a comparatively small sum in respect of one breach. Order XXII., rule 6 (*a*), makes provision for a payment into court, together with a denial of liability, and leaves the right to the costs outstanding. The plaintiffs can only recover their costs by proceeding with the action. This they are entitled to do, and having obtained judgment they may apply to have their costs taxed.

Moulton, in reply. Order XXII., r. 7, contemplates that the plaintiff shall be at liberty to tax his costs without signing judgment, and it is immaterial whether the defendant, who pays money into court does or does not deny his liability. The rule provides that the plaintiff's costs shall be taxed before judgment is signed, and the judgment is only required in the event of

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pendix B. as in rule 7 mentioned, or after delivery of a reply accepting the money, be entitled to have the money paid out to himself on request—unless the Court or a judge shall otherwise order.

r. 7. The plaintiff, when payment into court is made before delivery of defence, may within four days after the receipt of notice of such payment, or when such payment is first signified in a defence, may before reply, accept in satisfaction of the claim or cause of action in respect of which such payment has been made the sum so paid in, in which case he shall give notice to the defendant in the form No. 4 in Appendix B. and shall be at liberty, in case the entire claim or cause of action is thereby satisfied, to tax his costs after the expiration of four days from the service of such notice, unless the Court or a judge shall otherwise order, and in case of non-payment of the costs within forty-eight hours after such taxation, to sign judgment for his costs so taxed.

Form No. 4, Appendix B. "Take notice that the plaintiff accepts the sum of *l.*, paid by you into Court in satisfaction of the claim in respect of which it is paid in."

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non-payment. If it were otherwise the defendant might avoid the payment of costs by pleading a denial of liability. Rule 6 (*a*) and rule 7 must be read together. The clause in rule 6 (*a*) saving proceedings as to costs refers to the proceedings in rule 7.

POLLOCK, B. Except for the decision of my brother Field in *Crosland* v. *Routledge* (1) I should have thought that this case was free from difficulty. Order XXII., of the present rules is in substitution for Order XXX., of the rules of 1875, and while retaining some of the former provisions, such as Order XXX., r. 4, which is practically embodied in the new rule 7, it introduces new provisions, such as rule 6, which relates to payment into court with a defence denying liability, the rule providing that in such a case the plaintiff may accept the money so paid in, in which case he may have the money paid out to him, or if he does not accept it and proceeds with the action the money is to remain in court. Now, it would seem in accordance with natural equity that a plaintiff who has brought an action and recovered money in respect of a cause of action should have his costs, and ought it to make any difference that the defendant chooses while paying money into court which he is willing that the plaintiff should take out, at the same time to deny his liability? Such a denial of liability is commonly inserted by the pleader for caution's sake, and ought not to determine the liability to costs. The words in Order XXII., r. 6 (*a*), that in the event of the plaintiff accepting the money in satisfaction of the claim in respect of which it is paid he shall be entitled to have the money paid out to him "as hereinafter provided," refer to the provision in rule 7. Rule 6 (*a*) provides that upon such payment all proceedings shall be stayed except as to costs. The defendants contend that the result of this is that the issue as to liability must be proceeded with, but I have no difficulty in saying that the case then comes under rule 7, and the plaintiffs are then at liberty to give notice as in Form 4, Appendix B., and have their costs. The order appealed from must be reversed.

LOPES, J. I am of the same opinion. For my own part I have some difficulty in putting a construction upon these rules, but I

(1) W. N. 1883, 228.

think their object was to prevent unnecessary expense, and that when money was paid into court with a denial of liability they permitted the plaintiff to take it out in satisfaction of all liability in the action. The argument of the defendants appears to be that although the plaintiffs are willing to accept this money in full satisfaction they must go on with the action, and incur further expense before they can have their costs, and this simply because the defendants have at the same time that they pay money into court denied their liability. This seems to me a very strange proposition, particularly when we know that such a denial of liability is often nothing but the work of the pleader. I think that the plaintiffs are entitled to have their costs taxed, and that the order of Smith, J., must be rescinded.

Order rescinded.

Solicitors for plaintiffs: *Davidson & Morriss.*
Solicitors for defendants: *Stokes, Saunders, & Stokes.*

A. P. S.

GENESE *v.* LASCELLES.

June 23.

Bankruptcy—Order of Commitment—Judgment Summons—Judgment under 50l.—Appeal from Judge of High Court—Court of Appeal—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 103, 104—*Debtors Act,* 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5.

Under the Bankruptcy Act, 1883, s. 103—which enables the jurisdiction under s. 5, of the Debtors Act, 1869, to be delegated to and exercised by the bankruptcy registrars of the High Court, and s. 104, by which in bankruptcy matters, an appeal lies from the order of the High Court to the Court of Appeal—an appeal from an order of the judge having jurisdiction in bankruptcy respecting the commitment of a judgment debtor must be made to the Court of Appeal and not to the Divisional Court.

APPLICATION for leave to extend the time for appealing from an order of Cave, J., in chambers, by which he dismissed a judgment summons issued by the plaintiff.

It appeared that in November, 1883, judgment was signed against the defendant for 41*l.* 8*s.*, and that in February, 1884, Mr. Registrar Hazlitt made an order that the defendant should pay the plaintiff the debt and costs by instalments of 2*l.* a month.

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Default having been made in payment of the instalments, a second judgment summons was issued on the 2nd of May, when Mr. Registrar Hazlitt ordered the arrears to be paid in three days. On the 30th of May an order was made by Cave, J., dismissing the last-mentioned summons.

Henry Kisch, for the plaintiff. By the Bankruptcy Act, 1883, s. 103 (1), power is given to the Lord Chancellor by order to direct that the jurisdiction and powers under s. 5, of the Debtors Act, 1869, now vested in the High Court, may be exercised by the judge to whom bankruptcy business is assigned, and also to direct that the jurisdiction shall be exercised by the bankruptcy registrars. Accordingly by rule 265, this jurisdiction is ordered to be exercised by the bankruptcy registrars. Before the Bankruptcy Act, 1883, a judge at chambers dealt with orders of commitment, subject to an appeal to the Divisional Court: *Chard* v. *Jervis* (2), and this appeal is not taken away. The jurisdiction transferred to the registrars is only the jurisdiction which was formerly exercised by a judge and not that of the Divisional Court. This being the case, the Court has power under Order

(1) By the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, any Court may commit to prison for a term not exceeding six weeks a judgment debtor under a judgment not exceeding 50*l*., who makes default in the payment of any debt or instalment due under the order or judgment of a competent Court.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103, it shall be lawful for the Lord Chancellor by order to direct that the jurisdiction and powers under s. 5 of the Debtors Act, 1869, now vested in the High Court, shall be assigned to and vested in the judge to whom bankruptcy business is assigned.

(2.) It shall be lawful also for the Lord Chancellor, in like manner, to direct that the whole or any part of the said jurisdiction and powers shall be delegated to and exercised by the bankruptcy registrars of the High Court.

By rule 265, of the Bankruptcy Rules, 1883, "Unless and until the Lord Chancellor otherwise orders, the jurisdiction and powers of the High Court under s. 5 of the Debtors Act, 1869, shall be exercised by the bankruptcy registrars of the High Court."

By the Bankruptcy Act, 1883, s. 104, every Court having jurisdiction in bankruptcy may review, rescind, or vary any order made by it under its bankruptcy jurisdiction.

(2.) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows:

(R. 1.) An appeal shall lie from the order of the High Court to Her Majesty's Court of Appeal.

(2) 9 Q. B. D. 178.

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LXIV., rule 7, to extend the time for appealing from the order of Cave, J.

P. F. Wheeler, for the judgment debtor. Sect. 103, of the Bankruptcy Act, 1883, and rule 265 of the Bankruptcy Rules, 1883, shew that the Bankruptcy Court has all the jurisdiction which the High Court formerly had with regard to orders of committal under judgments for less than 50*l*. Sect. 104, enables every Court having jurisdiction in bankruptcy under the Act to review any order made under its bankruptcy jurisdiction, and this section immediately follows that relating to orders of committal. Then an appeal from an order in bankruptcy matters of the High Court is to the Court of Appeal. The present order is clearly a bankruptcy matter, and the appeal lies not to this Court but to the Court of Appeal.

GROVE, J. This application must be refused. Under s. 104 of the Bankruptcy Act, 1883, an appeal from the order of Cave, J., ought to have been brought before the Court of Appeal and not before this Court. I am of opinion that the object of this section and the preceding one, s. 103, was to take the jurisdiction with regard to the committal of debtors from the Divisional Court and give it to the Court of Bankruptcy. We have, therefore, no jurisdiction over any matter relating to this appeal.

HUDDLESTON, B., concurred.

Application refused.

Solicitors for plaintiff: *Beyfus & Beyfus.*
Solicitor for judgment debtor: *J. A. White.*

A. P. S.

1884
June 13.

[IN THE COURT OF APPEAL.]

THE BOARD OF WORKS FOR THE WANDSWORTH DISTRICT *v.* THE UNITED TELEPHONE COMPANY, LIMITED.

Telephone Company—Wire extending across Street—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 96—"*Street*"—*Property of Vestry or District Board in "Street"—Telegraph Act*, 1863 (26 & 27 *Vict. c.* 112), *ss.* 2, 3, 12—*Telegraph Act*, 1868 (31 & 32 *Vict. c.* 110), *s.* 2—*Telegraph Act*, 1869 (32 & 33 *Vict. c.* 73), *ss.* 2, 3—"*The Company*"—"*Telegraph Company*"—*Consent of Local Authority—Trespass—Injunction.*

The Metropolis Management Act, 1855, does not by s. 96 confer upon a vestry or a board of works (constituted under that statute) such a property in the streets situate within their district, as to entitle them to maintain an action for an injunction against the erection of a telephone wire across a street, the telephone wire being erected at a great height and causing no appreciable danger to the public or to the traffic in the street.

Coverdale v. *Charlton* (4 Q. B. D. 104) followed.

Notwithstanding the Telegraph Act, 1869, s. 3, a telephone company registered under the Companies Act, 1862, and not incorporated under any special Act, does not fall within the phrase "the company" used in the Telegraph Act, 1863, and therefore is not forbidden by s. 12 of the last-named Act to erect its wires across a street, unless the consent of the body having the control of the street is obtained.

ACTION for an injunction to restrain the defendants from retaining or placing any wire or wires for the purpose of telegraphic or telephonic communication or otherwise, over, along, or across any street vested in, or under the control of the plaintiffs, except in cases where the defendants had received or might receive the plaintiffs' consent to retain or place the same.

At the trial before Stephen, J., in May, 1884, the following facts were either admitted or proved:—

The plaintiffs were the local authority under the Metropolis Management Act, 1855, for the parish of Putney in the county of Surrey. The defendants were a joint stock company, not incorporated by any private Act of Parliament, but registered under the Companies Act, 1862. The defendants had lately erected for a private person in Putney a telephonic wire connecting two of his places of business in Putney, and had supplied it at each end with proper telephonic apparatus. The wire and the instruments were the property of the defendants, and were maintained

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by them, the use thereof being regulated by a contract between them and their customer. The wire was attached at eleven different points to chimneys, and was carried at several places for a considerable distance over highways in the district. At one place it passed over the High Street of Putney, at a very obtuse angle, its height from the ground being about thirty feet, and its total length from the point of attachment on the east side to the point of attachment on the west side and thence to a third point of attachment on the east side being 430 feet or 143 yards or thereabouts, the greater part of which was over the street.

Stephen, J., was of opinion first, that the defendants were not a company subject to the provisions of the Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 12, and did not require the license of the plaintiffs to place a telephone wire over, or along, or across a street. He held, secondly, that the overhead wire in question was not a nuisance to the highway, and that apart from the question of property the plaintiffs were not entitled to have it removed; that the evidence given on both sides appeared to him to shew that the wire in question was nearly new, that it was properly taken care of, and had been lately examined and found to be in perfect condition, and likely to last for several years without becoming perceptibly weaker than it then was; that it caused, and in the common course of events it was likely to cause, no perceptible danger to the public, though a violent storm might possibly blow it down; and that upon the whole, though he could not say that absolutely no danger arose from the position of the wire, he did not think that it could be an indictable nuisance, and that if it had been erected with the consent of the district board, and if the defendants had been indicted for creating a nuisance at common law, he should not have hesitated to direct a jury that there was no evidence of such a nuisance as to justify a conviction. But Stephen, J., held, thirdly, that the plaintiffs, as owners of the soil under the Metropolis Management Act, 1855, s. 96, had an absolute right to prevent the defendants from suspending wires over the street in question upon the principle that the air immediately above the roadway was as much theirs as the roadway itself. The learned judge relied upon the reasons of the Lords Justices in

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their judgments delivered in *Coverdale* v. *Charlton* (1), and was of opinion that Parliament had intended to give to the district board proprietary rights over the "street," including in that word a certain space upwards as well as downwards, in order that the district board might form a judgment as to the expediency on public grounds of permitting or refusing to permit various acts, which, without being actual nuisances in such a sense as to be indictable, might nevertheless be regarded as undesirable innovations. He further thought that the object of the Metropolis Management Act, 1855, s. 96, was to invest district boards with the character of owners, in order that they might use for the public convenience rights which a prudent private owner would use in his own interest and in the interest of his tenants.

For the foregoing reasons, Stephen, J., gave judgment for the plaintiffs in the terms claimed by them, but he ordered that, as the case was of great importance, and as the wire caused no appreciable actual danger to the highway which it crossed, the injunction was not to issue until after the hearing and final determination of an appeal to be brought by the defendants.

The defendants appealed.

June 12, 13. *Webster, Q.C.*, and *Cozens-Hardy, Q.C.* (*Moulton* with them), for the defendants. It is true that by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 96 (2), the streets within their district are vested in and under the control of the plaintiffs as the district board of works, but that does not give them such a right as the owner of the soil would have according to the maxim, "cujus est solum ejus est usque ad cœlum," but a more limited right: *Coverdale* v. *Charlton* (3), as explained by *Rolls* v. *St. George's, Southwark*. (4) That case of *Coverdale* v. *Charlton* (3) was decided with reference to s. 149 of the Public

(1) 4 Q. B. D. 104.

(2) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 96, "all streets being highways, and the pavements, stones, and other materials thereof, and all other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, or by any vestry or district board under this Act, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate."

(3) 4 Q. B. D. 104.

(4) 14 Ch. D. 785.

Health Act, 1875 (38 & 39 Vict. c. 55), but that section is substantially the same as s. 96 of the Metropolis Management Act, 1855, and the decision shews perhaps that there is vested in the district board such an interest in the streets, including what is above and below the surface, as would be necessary to enable the board to prevent anything being done which should cause any appreciable injury to the traffic over the streets. Here, however, as is shewn by the finding of the learned judge, there was not in fact any appreciable injury to the traffic by the telephone wires of the defendants affixed by them over the streets in question. The decision of the judge was given in favour of the plaintiffs solely on the ground that the suspension of the wire over the streets was a trespass, in respect of which the plaintiffs in whom the streets were vested had a right to complain. In *Wandsworth Board of Works* v. *London and South Western Ry. Co.* (1) the railway company, for the purpose of widening a bridge which they had over a highway, put buttresses in the road without the leave of the district board in whom the soil of the road was vested, and yet Kindersley, V.C., refused an injunction to restrain the railway company from widening the bridge, because he did not think that what the railway company did was any real obstruction or injury to the public. In the opinion of Lord Ellenborough a trespass is not committed by firing across a field in vacuo, or by passing over it in a balloon: *Pickering* v. *Rudd.* (2) In *Fay* v. *Prentice* (3) and *Battishill* v. *Reed* (4) the alleged injury was treated as a nuisance and not as a trespass.

Philbrick, Q.C., and *Wilkinson*, (*R. O. B. Lane* with them,) for the plaintiffs. It is clear that a right of property in the soil of the streets is, at least to some extent, vested in the plaintiffs as the district board. That is borne out by the judgment of James, L.J., in *Rolls* v. *Vestry of St. George, Southwark.* (5) If the statute 18 & 19 Vict. c. 120, s. 96, gives, as it does, a right of property in the soil of the streets to the district board, is such board not to have the same right above the surface as any other

(1) 31 L. J. (Ch.) 854.
(2) 4 Camp. 219.
(3) 1 C. B. 828; 14 L. J. (C.P.) 298
(4) 18 C. B. 696; 25 L. J. (C.P.) 290.
(5) 14 Ch. D. 785.

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owner of the soil would have? They must have the right, which any such owner would have, to prevent the owners of adjoining land from making a bridge over it. It is an infringement of the right of the owner of the soil to erect anything which passes over it; and this is sufficient to entitle the plaintiffs to an injunction, even although they admit that there is no evidence to shew that the defendants have been guilty of an indictable nuisance. But there is some evidence of a nuisance of which a civil tribunal will take notice, for the wire might be blown down during a violent storm, and this risk is sufficient to entitle the plaintiffs to an injunction.

Further, a telephone is a telegraph within the meaning of the Telegraph Acts, 1863, 1869, as was decided in *Attorney General* v. *Edison Telephone Company of London* (1), and therefore it was unlawful to put up a wire across a street within the plaintiffs' district without their consent. The Telegraph Act, 1869 (32 & 33 Vict. c. 73), by s. 2 incorporates the Telegraph Act, 1868 (31 & 32 Vict. c. 110), and by s. 3 the term "telegraph company" is interpreted to mean "any company, corporation, or persons for the time being engaged in transmitting, or by any instrument incorporating the same authorized to transmit, telegrams within the United Kingdom of Great Britain and Ireland, for money or other consideration." The Telegraph Act, 1868, by s. 2 incorporates the Telegraph Act, 1863 (26 & 27 Vict. c. 112), and by s. 12 of the latter statute it is enacted that "the company shall not place a telegraph over, along, or across a street or public road . . . . except with the consent of the body having the control of such street or public road." It is true that the Telegraph Act, 1863, owing to the terms of ss. 2, 3, applies only to companies authorized by special Act of Parliament, and therefore if it stood alone, its provisions would not extend to the defendants, who are merely registered under the Companies Act, 1862; but, as has been shewn, it is incorporated with the Telegraph Act, 1869, and as the defendants are a "telegraph company" within s. 3 of the last-named statute, they are forbidden by s. 12 of the Telegraph Act, 1863, to erect a telephone wire across a street within the

(1) 6 Q. B. D. 244.

plaintiffs' district without their consent. It follows, therefore, that on this ground alone the plaintiffs are entitled to maintain this action for an injunction.

[BOWEN, L.J. This argument on behalf of the plaintiffs is an attempt to apply the interpretation of a phrase occurring in one Act of Parliament to the interpretation of a similar but different phrase occurring in another Act of Parliament; in the Telegraph Act, 1863, s. 3, the phrase used is "the company," while in the Telegraph Act, 1869, the phrase used is "telegraph company."]

Cozens-Hardy, Q.C., in reply. Sect. 41 of the Telegraph Act, 1863, which provides that every telegraph shall be open for the messages of all persons alike, shews that none of the provisions of that statute can apply to an invention like a telephone, as described in *Attorney General* v. *Edison Telephone Company of London*. (1) The object of the Telegraph Act, 1869, was merely to give to the Postmaster-General a monopoly as to the transmission of telegraphic messages; it was not intended to interfere otherwise with the powers of companies which might be lawfully carrying on business.

BRETT, M.R. It seems to me that the main point of this case must be decided on what is the true construction of the Metropolis Management Act, 1855, s. 96, as applied to the circumstances proved at the trial. Now, the circumstances of the case are, that a telephone wire is fixed to the chimneys of certain houses, and therefore is above the level of the roof of the houses, and passes diagonally across a street, the owners of the houses making no objection. Those are the circumstances with which we have to deal. The question is, whether the district board of works have a right to object, not to the wires being fixed to the chimneys—for it is not pretended that they have any right to interfere with that which is done by the leave of the owners—but whether they have a right to object to the wire as it passes across the area of the street, that is, the area which is between the lines of houses, and to object to this extent, that they are entitled to have an injunction against the Telephone Company to prevent them from any longer keeping that wire

(1) 6 Q. B. D. 244.

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across the street. The solution of this question must depend on the construction of the Act of Parliament, which gives powers to the board of works. Whatever the extent of the powers of the board of works may be, I think it cannot be doubted that if they had shewn that these wires were a nuisance to the street, or interfered with the proper user of the street as a street, they would have been entitled to an injunction. If the wire had been dangerous to the use of the street, it would then have been, as I think, a nuisance to the street, and I do not doubt that the board of works might, in that case, have maintained an action for an injunction. But whether this wire was a danger, and in that sense a nuisance to the street, was a question of fact. Upon that question of fact I think there was evidence on both sides. I do not deny that there was evidence which had to be considered by the learned judge who tried the case, as to whether this wire was dangerous to the street or not; but there was very strong evidence indeed on the other side that it was not of any practical danger; there was very strong evidence, which really was not contradicted in the least, that this wire, put up as it was with ordinary care, and being of ordinary material, would not begin to deteriorate so as to become dangerous for several years after it had been put up, and that even after several years it would take many more years before it became really dangerous. Upon that evidence, having considered it, the learned judge who saw the witnesses, and who had the means of estimating what credit ought to be given to their care and their truthfulness, came to this conclusion, that there was no appreciable danger in the wire at present, and for some considerable time to come. If there is no appreciable danger, that, in fact as well as in law, means that there is no danger at all. It cannot be said that wires, fixed to the tops of chimneys above the street, really can interfere with the traffic and use of the street in its ordinary acceptation, and therefore there is no ground upon which this injunction can be maintained, unless it be that the mere fact of putting the wire where it was, was a trespass upon the property of the board of works. It comes to that—and the learned judge, as I understand it, did decide in favour of the plaintiffs upon that ground—that this wire was a trespass upon the property of the plaintiffs, and therefore, whether

it injured the plaintiffs or not, they were entitled to have an injunction.

That really raises the question whether this wire was a trespass upon the property of the plaintiffs. Now, what belongs to the plaintiffs is given to them by an Act of Parliament; they have no rights except under an Act of Parliament. The Court of Appeal had to consider, in the case of *Coverdale* v. *Charlton* (1), a similar Act, namely, the Public Health Act, 1875, s. 149. The words of the Act of Parliament, upon which the plaintiffs found their claim, being almost the same as they were in *Coverdale* v. *Charlton* (1), I take the result to be this, that the Metropolis Management Act, 1855, s. 96, vests in the board of works the street, and therefore the same questions arise as did arise in that case, namely, what, in that Act of Parliament, is the meaning of the word "vests," and what is the meaning of the word "street," and what is the true effect of that Act of Parliament when both those words have been duly interpreted. In *Coverdale* v. *Charlton* (1) the first point that the Court of Appeal did consider was, what was the meaning, in the Public Health Act, 1875, s. 149, of the word "vests," as applied to the subject-matter of the Act? There was not only the word "vest," but there were other words as to the control of the street; and the Court of Appeal had to consider what was the meaning of that phrase "vest in," accompanied, as it was, by the other words as to control. Much has been said, and much must always be said, of the judgment of Lord Bramwell upon the point. No more valuable judgment could be given upon any point than one given by Lord Bramwell. I do not deny that there is some difficulty in now following what exactly was his view upon each point of the case, that is to say, how far he thought that the property in whatever was the subject-matter passed under the word "vests." He certainly was of opinion that the word "vest" gave the local board so much property in the grass (which was the question then being discussed,) that they could give a right to the possession of that grass to the plaintiff in that action. It gave them such an interest in the grass that they could pass an interest in it to somebody else. I shall not go further with regard to Lord Bramwell's judgment

(1) 4 Q. B. D. 104.

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in that case as to the meaning of the word "vest." My own view at that time was that it passed in whatever was the subject-matter to be dealt with, the property; it passed the property so as to enable the local board, as far as anybody else than the public was concerned, to do with it what any other owner might do. There might be a breach of their duty to the public, but with regard to anybody else than the public they could do with it as any other owner could do, that is, without infringing that which was their primary duty, namely, to keep it as a street. I thought, then, that an Act of Parliament must be interpreted according to the ordinary meaning of the words as applied to the subject-matter of it; and that, inasmuch as the subject-matter was that which was usually called "property," when the Act of Parliament said that property should vest in the local board, it vested in them just as property does vest in any person to whom it is transferred; but it was not necessary to decide in that case, although I have not the least doubt that it was clearly in our minds, the question whether that was a vesting of the property for ever, or whether it was only a vesting of the property for a limited time. In the subsequent case of *Rolls* v. *St. George's Southwark* (1) it came to be necessary to consider, not what kind of property vested—i.e., the extent of the right that was given whilst it existed—but the length of the existence of the right; and in that subsequent case the Court of Appeal came to the conclusion that whatever the right was, it existed only as long as the piece of ground was a street; that was a decision as to the duration of the right, not as to the extent of the right whilst it lasted. Therefore agreeing entirely, I need hardly say, with *Rolls* v. *St. George's Southwark* (1), it seems to me, that the opinion which I at all events formed in that case of *Coverdale* v. *Charlton* (2) comes to this, that the property in the street passed to the local board, which became their property as long as the piece of ground was a street. If the piece of ground ceased to be a street, then their property also ceased. It is a condition subsequent; but, as long as the piece of ground was a street, whatever was the street was their property, vested in them as their property by the Act of Parliament.

(1) 14 Ch. D. 785. (2) 4 Q. B. D. 104.

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Now comes the question, which arose also in *Coverdale* v. *Charlton* (1), namely what is the meaning of the word "street" in the Act of Parliament, because what vests in the board of works is in terms "the street." They have a property in the "street." What is the "street"? In considering that case it was suggested that the street was only a right of way. But the Court of Appeal certainly went further than that, and held that the property of the local board was something more than a right of way or control over the right of way. Then it was suggested that it was only the surface, on which the public walk, which is called the "street." The Court went further than that, and came to the conclusion that the property of the local board went below the mere surface. I want to see what each of the judges, or at all events what Lord Bramwell thought about this point, and what I myself thought about it, for it seems to me that this point was the foundation of the judgment, and is therefore the principle on which that judgment passed. Very considerable doubts were expressed by Lord Bramwell in the course of his judgment, for doubts often struck his mind, which saw both sides of a disputed question; but I incline myself to think, although I do not say I am right about it, that his real judgment as to the meaning of the word "street" is contained in these words: (2) "'street' comprehends what we may call the surface, that is to say not a surface bit of no reasonable thickness"—not a mere mathematical surface—"but a surface of such thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the streets"—that is what he thought it comprehended—"and to that extent they had a property in it." That seems to me to be the real ground of his judgment in that case. That judgment seems to me to shew that the property passes to a certain depth, and that depth is what may be called "the area of user": not the area of an accidental user, of an user for once, but the area of the ordinary user, that is, the ordinary user such as is usually needed for the ordinary works which are done in a street. If that is taken to be Lord Bramwell's judgment, I confess that I do not think it differs

(1) 4 Q. B. D. 104. (2) *Coverdale* v. *Charlton*, 4 Q. B. D. at p. 118.

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from what I also endeavoured to say in that case. I find that I said (1): "The words of this section vest the property in the street; and the street does not include the houses by the side of the street; it includes the space between the houses which is used as the footway and roadway. 'Street' means more than the surface, it means the whole surface, and so much of the depth as is or can be used, not unfairly, for the ordinary purposes of a street. It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise the street and to lay down sewers: for, at the present day, there can be no street in a town without sewers, and also for the purpose of laying down gas and water pipes. 'Street,' therefore, in my opinion, includes the surface and so much of the depth as may be not unfairly used as streets are used. It does not include such a depth as would carry with it the right to mines, neither would 'street' include any buildings which happen to be built over the land, because that is not a part of the street within the meaning of such an Act as this. If the enactment gives the local board that property in so much of the land, it gives them the absolute property in everything growing on the surface of the land. The legislature have, because the right of owners to the soil in a 'street' is of so little value, intentionally taken away that right, and have given it to the extent I have mentioned to the local board." I think my brother Cotton's judgment is the same. Therefore, the groundwork of that judgment is, as to the depth at all events, that in the Public Health Act 1875, s. 149, in which the word "street," a popular word, is used, and the word "land" is not used, the word "street" must receive the popular meaning existing at the time when the Act of Parliament was passed. With regard to the width, it is the width between the houses, and is actually the popular meaning of the word "street." With regard to the depth, it is what may be called in this case the area of ordinary user existing at that time, and nothing beyond or below that. If that is the principle of the judgment in *Coverdale* v. *Charlton* (2), then it seems to me that that case is an authority for a principle, which must be applied in the present case. I confess that, after all I have now heard, not only do I

(1) *Coverdale* v. *Charlton*, 4 Q. B. D. at p. 121. (2) 4 Q. B. D. 104.

think that case binding as an authority with regard to the principle on which it was decided, but I am still more convinced than I was before that the statement of that principle, with regard to the interpretation of the Public Health Act, 1875, s. 149, was and is right, and that it points out the only interpretation which can be given to the words of the Act of Parliament. Therefore the word "street" is interpreted to mean that, which contains the area of ordinary user of a portion of the ground as a street. Having applied that to the depth below the surface, we must apply it to the height above the surface. I think the word "street" must include something above the surface. What does it include? It has been argued before us that because the surface passes, therefore everything above the surface usque ad cœlum passes under the words of the Metropolis Management Act, 1855, s. 96. I am not about to question that which has been laid down by Lord Coke in Co. Litt. 4 a, namely, that where a piece of land is granted or is conveyed in England by a grant from the king or by a conveyance from party to party, under the word "land" everything is passed which lies below that portion of land down to what is called the centre of the earth—which is, of course a mere fanciful phrase—and usque ad cœlum—which to my mind is another fanciful phrase. By the common law of England the whole of that is transferred by the grant or the conveyance under the term, "land." But I am of opinion that it does not follow that in a grant or conveyance the word "street" would produce the same result. I am not clear about that, but even although it would have that effect in a grant or a conveyance, that is not the question here. The question is, what is the meaning of the word "street" in the Metropolis Management Act, 1855, s. 96, and when we are dealing with the meaning of it in that Act of Parliament we must consider for what purpose that Act of Parliament was passed and with what and with whom it is dealing. It is dealing with streets of which the public have the use, and it is dealing with the persons who have, for the benefit of the public, the guardianship of, and the property in, those streets. If the word "street" comprises merely the area of user below the surface, what is there to shew that it can include anything but the area of user above the surface? It seems to me

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really logically to follow that those who came to the conclusion that in the Public Health Act, 1875, s. 149, the word "street" includes downwards from the surface only that which is within the area of ordinary user of the piece of ground as a street, must, if they are consistent, hold that the same rule applies to that which is above the surface, and therefore that it includes only so much of the area which is above the surface, as is the area of the ordinary user of the street as a street. That cannot be measured by saying that it is a foot higher or a foot lower, according as a hay cart is loaded a foot higher or a foot lower. That is not the way to deal with practical matters. It cannot be said that the ordinary user of the street is measured by the height of a particular thing; it is measured by the ordinary height of things which use the street as a street. I doubt very much whether the ordinary user is confined to the present height of a fire-escape. A fire-escape is at all events used in a street, and some fire-escapes are higher than others; but at the present time no fire-escape is as high as a tower, and therefore we need not deal with this suggestion. The ordinary user of a "street" may go as high as the top of a fire-escape, for anything that I know, but I am not about to measure exactly to what height it goes; it is enough for me to say that it goes above the surface to the height of the ordinary user of a street as a street.

Now comes the question, how is that rule to be applied to the case of a wire which is fixed to the top of chimneys. No one uses a street, in the ordinary course of using a street, by walking along the tops of the chimneys, or by going through the air at the height of an ordinary chimney. That is not the ordinary use of a street; it is not within the area of ordinary user of a street as a street. In ordinary language, that is not in the street, but it is above the street. I am of opinion that this Act of Parliament by the use of the word "street" does not pass any property *above or over* the street, it only passes property *in* the street. It therefore passes only that which is the ordinary space occupied by men or things, which use the street as a street. Under those circumstances, it appears to me that no property passed in that part of the air through which, or in which, this telephone wire was placed. If this telephone wire as placed had been

dangerous to that which did pass, that is to the "street" as I have interpreted it, an injunction would have been properly granted against the use of it, because it would have been a danger to the street and to the public, who have a right to use the street, and the board of works, who are the legal owners of the street and the trustees for the public of the street, would have properly interfered. But in the absence of danger, and when the case is put simply and solely on the ground that there is a trespass on that space of the air which is above the roadway and footway, I am of opinion that although the board of works have the property in certain parts of the earth, namely, the street as it is a "street," yet this wire was not in that part of the earth which was the property of the board of works, and was not in the "street." To say, what anybody in ordinary language would say of it, it is a wire passing *over* the street, and it is not a wire *in* the street. I think therefore my Brother Stephen construed the meaning of the word in the Metropolis Management Act, 1855, s. 96, too largely, and that he could not grant an injunction on the mere ground that this was a trespass upon the property of the plaintiffs.

Another point was raised by the plaintiffs' counsel with which I do not think it necessary to deal elaborately. What I have disposed of, is the real strength and pith of the argument in this case; but another point was that the wire could not be put up without the leave of the board of works, although it was not put up on the property of the board of works. That depended on the construction of certain Acts of Parliament. I agree with what my Brother Bowen pointed out during the argument, namely, that the plaintiffs' counsel were endeavouring to apply an interpretation occurring in one Act of Parliament, and confined to a particular phrase in that Act, to the interpretation of a similar but different phrase to be met with in another Act of Parliament. They wished to read the phrase, "telegraph company," occurring in 32 & 33 Vict. c. 73, s. 3, and there interpreted to mean any company or corporation engaged in transmitting telegrams, as applying to the word "company" to be found in the Telegraph Act, 1863, ss. 3, 12: if this were a correct construction, the plaintiffs would be entitled to an injunction against the

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defendants, who have not obtained their consent. But it seems to me to be an erroneous construction, when two Acts of Parliament are incorporated, to apply the interpretation in the one Act of Parliament of one phrase to the interpretation of another phrase occurring in the other Act of Parliament.

I think that we must follow *Coverdale* v. *Charlton* (1), and that this case comes within its principle, and that this wire is placed upon no property of the plaintiffs, so as to entitle them to an injunction, on the ground that there is a trespass on their property. I am of opinion that no nuisance with regard to it has been proved, and therefore that no injunction ought to have been granted in this case. I wish to repeat that I agree with the decision in *Rolls* v. *St. George's, Southwark.* (2)

BOWEN, L.J. I entertain no doubt that if appreciable danger to any street, or to the traffic of any street, which is vested in the board of works, is shewn, the Courts will interfere by injunction to prevent anything being done in the area above the street, which is the cause of danger; and if in the present instance it had been proved, and was the reasonable conclusion to be drawn from the evidence, that there was any substantial risk at all, or in other words, any appreciable danger to the public, it would be the duty of this Court to compel the removal of this wire which overhangs the thoroughfare. But the counsel for the plaintiffs did not deny that it was hopeless in the present state of the evidence in this case, (whatever might be the result in other cases,) to controvert the opinion of the learned judge who saw and heard the witnesses, that there was no appreciable danger to the public in this wire being hung where it was. The real question which we have to decide is whether, when there is no appreciable danger to the public or the traffic in the street, the board of works in whom the street is vested are entitled under the Metropolis Management Act, 1855, s. 96, to put a veto upon the putting up of the wire, unless their consent is obtained. This point of law we have to decide. Have the board of works vested in them such property in the streets as to enable them to interfere at their own mere will and pleasure with a wire, which,

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it is conceded for the purpose of this point alone, involves no danger whatever to the street or the traffic, and is no interruption? It is obvious that this is a very important point. It is important not only to those who wish to develop the telephonic communication of this country in large cities, where I have no doubt it is more valuable than in the country, but it is also very important because if the suggested construction of the Act is right, it confers on the board of works practically the power of levying a toll in the air, unrestricted by the interests of the public, or by the interests of the traffic in the street; for ex concessis, there is no danger to the traffic in the street or to the public. The question is, whether where there is no danger, they can still refuse their consent. If the board of works were in the position of simple owners of land, or if land had been vested in them by an ordinary conveyance, I should be extremely loth myself to suggest, or to acquiesce in any suggestion, that an owner of the land had not the right to object to anybody putting anything over his land at any height in the sky. It seems to me that it is not necessary to decide upon what exact legal fiction, or on the existence of what legal theory one is to justify the principle which I think is embodied in the law, as far as I have been able to see, that the man who has land has everything above it, or is entitled at all events to object to anything else being put over it. But this is not a conveyance, nor is it the transfer of landed property from one person to another, nor of the ownership of land in the ordinary sense of the term. The board of works have what the Metropolis Management Act, 1855, has given to them; they have no more and no less, and what we really have to decide is whether, under s. 96 of 18 & 19 Vict. c. 120, the board of works had given to them, not merely some interest in the soil, but the same sort of extensive proprietary rights that belong to the owners of land throughout this country, namely, to have nothing placed above it between themselves and the sky. That must, of course, depend on the terms of the Act of Parliament. Parliament can do exactly what it pleases, and the only matters to be borne in mind in construing the section are two rules. It seems to me, first, that words of popular meaning must be taken in their popular sense, unless there is something

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in the context to alter it; and secondly, that if a word in its popular sense, and read in an ordinary way, is capable of two constructions, it is wise to adopt such a construction as is based upon the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act, and not to give any unnecessary powers. The section of the Act which we have to construe deals with streets, and it enacts that the streets are to vest in and be under the management and control of the vestry or district board of works. Although a street in one sense may be said to be capable of being strictly defined by a lawyer as the right of the public to pass along a way, one knows that in ordinary parlance that is not what is meant by the "street;" and it seems to me that it is impossible to read the Metropolis Management Act, 1855, and the subsequent Acts which bear on the same subject, without coming to the conclusion that the legislature was not dealing with a simple right of passage when it vested streets in the local board; it was dealing with something material and physical; and "the street" seems to me to be treated as a material thing. That I think is the basis, or one of the bases at all events, of the decision in *Coverdale* v. *Charlton*. (1) But, assuming that something physical is meant to be vested, we still have to construe both the term "vest," and the term "street." Now, to my mind, when in a section of an Act of Parliament the expression occurs that a street is to vest, it is impossible to advance very far by taking the term "vest" by itself, and asking one's self what it means. The true method of construction is to ask one's self also whether any light is thrown on the word "vest" by the fact that the statute is dealing with the word "street," and whether any light is thrown on the word "street" by seeing that the word "vest" is used in regard to it. We have to see what the Act of Parliament meant by the combined expression. In ordinary cases, when land is said to be "vested," I suppose it is meant that an estate in land is vested; but the term "vest" is used not only with regard to an ordinary interest in land, but also with regard to proprietary rights which are transferred to, or placed in, or made to reside by Act of Parliament or by the will of the parties in, some person, whether an individual or a body corporate.

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Accordingly it may have a different meaning, according as the proprietary right which is said to be vested is capable of different meanings. Two of the views—I will not say the only views—but two of the views which may be taken of this section, seem to me to be these; first that the Act of Parliament means definitely to plant in the board of works a right analogous to a freehold interest at common law in at least some portion of the soil; or secondly that in using the term "vest" in regard to the special statutory right of property, all that it means to do is to plant in a board of works such a statutory interest in the possession of the soil and surface as is necessary to enable them to carry out the powers of the Act. These two views seem to me to be distinct. Which view is the true interpretation of the Act of Parliament? Passing to *Coverdale* v. *Charlton* (1), I think myself that the case decides one point, but that the language of the Lords Justices extends rather beyond what the mere decision which they have given requires. That does not render the authority valueless, or one to which I should be less glad to pay respect, but all that seems to me to be necessary for the decision in *Coverdale* v. *Charlton* (1), and all that it did in fact decide, is that there was vested in the local board such a statutory property or interest in the surface of the soil, as was sufficient to justify them in giving exclusive possession of the surface. That reduces the point down to an academical question as to whether what passes in the surface, and the soil below the surface, is in the ordinary sense the right of a landowner, or whether what passes is a statutory right, to be defined by collecting the powers of the Act together, and seeing what the Act meant to be done with the surface and soil; and reading the language of the three judges in *Coverdale* v. *Charlton* (1), I am not sure that they all took exactly the same view of this academical point. Lord Bramwell's judgment has been discussed at length, and the Master of the Rolls has explained what his own view was. With regard to the judgment of Cotton, L.J., I am not sure that he meant to go further than to say that whatever the Public Health Act, 1875, s. 149, does pass, at all events the interest is large enough to give to the local board the right to transfer the grass

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growing on the soil. When a similar subject came before this Court in the case of *Rolls* v. *St. George's, Southwark* (1), it was necessary, in one point of view, to consider how far *Coverdale* v. *Charlton* (2) had gone, because in *Rolls* v. *St. George's, Southwark* (1), the question was whether the duration of the interest was the same as the ordinary duration of property in the owner of freehold land, or whether it was, so to speak, a statutory duration, limited by the objects and powers of the Act. Therefore it was by no means immaterial to consider whether, in the first case of *Coverdale* v. *Charlton* (2) the Court had been considering the interest to be an ordinary interest vested indefeasibly in a certain extent of the surface of the soil, whatever that extent might be, or whether, so to speak, it was a statutory interest the limits of which must be ascertained from the Act of Parliament; because, as the one or the other view was taken, some light might be thrown on the question for what time the interest of the bearer was to last. When it came to the judgment of Cotton, L.J., in *Rolls* v. *St. George's, Southwark* (1), he explained that all he meant to decide in the first case was that some property in the soil had passed to the local board; and when it came to the judgment of Thesiger, L.J., he said that the effect of the former case was substantially this, that only some right of property or some possessory right which would enable the local board to maintain actions in respect of that property or possessory right was given, and that the decision of the Court did not mean to go one step beyond that. If I may speak my exact opinion with perfect frankness, I do not think the decision did go beyond that which the language of Thesiger, L.J., stated. The point was whether the statutory interest conferred upon the local board by the Public Health Act, 1875, s. 149, whatever it might be, was not sufficient to prevent any possession being taken or any enjoyment of any portion of the surface without any leave of the local board; and therefore it became unnecessary to discuss in *Coverdale* v. *Charlton* (2) whether what was given was the ordinary ownership of land, the ownership of the surface and soil, or whether it was a statutory ownership for the purposes of the Act. Having discussed the term "vest," we come to the term, "street." What is the meaning of the term,

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"street"? Now we come to language which I do not myself consider is the basis of the decision in *Coverdale* v. *Charlton* (1). I do not myself see that it was necessary for the Court in that case to say how far below the surface the "street" went. Therefore, I do not think that any expression of opinion by the Court of Appeal as then constituted would be binding in a later case, though no one follows the authority of preceding judges more gladly than I do. However, I see no reason to doubt that the "street" covers at all events the area of user or the zone of user, the two terms which may be applied. I think that whatever meaning is put on the word "vest," and whatever meaning is put on the word "street," some statutory interest of a proprietary character in the surface and some portion below the surface is at all events granted in the soil, so far as is necessary to protect the "street" and traffic passing along it from injury, and to enable the board to exercise all their powers with regard to it. Now, with regard to the air above the "street"—(again I am trying to distinguish as far as I can, what is necessary for the decision and what is not, because I think a Court always decides with much more certainty, and precision, and accuracy when it confines itself to what is necessary to be decided)—all that I feel called upon to say is, that I am satisfied the board of works have not any proprietary interest above the "street," except what is necessary to protect the street and the traffic from interruption or danger, or to enable them to exercise their powers in the "street." Whatever the vesting of the "street" means, it does not mean more than that. I think therefore, without wishing to derogate or to undermine in any way the supposition that the owner of land, as land, has a full right of enjoyment of everything above his land, that the answer to the present plaintiffs' case is that the board of works are not and are not meant to be absolute owners of land, but that a defined and limited right is given to them, not in land as land, but in a street as a street. Reference must be made to the Act to see what that means, and I think it was not within the purview of any possible object of the legislature, that a public body in this country should be invested with more power of interference with the exercise of private enterprise and

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adventure than was really necessary for the protection of those public interests, which are entrusted to their charge. I think, therefore, with great respect for his judgment, that the learned judge was wrong in carrying the legal right of the board of works so far as he did.

As to the construction of the Telegraph Acts, 1863, 1868, 1869, the Master of the Rolls has said all that I need say.

Again, I only wish to emphasize that with which I began, namely, that this decision does not shew that if a danger to the street, or traffic, or public, is made clear, it is not the duty of the Court to interfere, or that the board of works would not have a locus standi to complain.

FRY, L.J. The plaintiffs in this action have sued for an injunction on any one of three grounds. In the first place, they have claimed it on the ground that the wire in question is a nuisance in consequence of the danger which it creates to the traffic of the street; secondly, they have claimed it on the ground that it is an invasion of their proprietary rights; and, in the third place, they have urged that there was a want of statutory consent, which they were entitled to give or refuse. Those points must, of course, be considered separately. It appears that the wire in question is thirty feet above the street. I think the conclusion from the evidence must be considered to be that at which the learned judge arrived, that no appreciable danger has been shewn to exist from this wire. The judge saw the witnesses, he knew what weight to attach to the different persons who bore testimony before him, and it appears to me that it is impossible for us to interfere with the decision on any ground of difference of opinion, with regard to the question of nuisance. In saying that, I am not for a moment intimating that I in any way differ from the conclusion at which he has arrived.

The second question is the one which has given rise to the most protracted argument. Is there in this case any invasion of the proprietary rights of the plaintiffs? Now that turns on the meaning of words, which I cannot help feeling are somewhat obscure. The 96th section of the Metropolis Management Act, 1855, has declared that the streets, being highways, and the pavements,

stones, and other materials thereof, and all other things provided for the purposes thereof, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situated. What at once strikes the mind is this, that the object of the section is to give something more than the management and control over these streets. It is to "vest" the streets in the Board, whatever that may mean; and undoubtedly, difficulty arises from this reason, that the word "street" expresses rather a popular than a legal conception, and that there is great difficulty in understanding what the meaning of "vesting a street" is, when we bear in mind that the Act is silent with regard to the duration of the interest, with regard to the extent of the property to be vested in the board, and with regard to the quality of the estate which they are to take. If the matter had been entirely uncovered by decision, I am not certain that I might not have come to the conclusion that the safer view was this, namely, that the statute intended to vest as land, with all its rights, the area which was covered by the street; in other words, everything beneath and above the superficies of the street. But that proposition has not been argued before us, and it has not been argued before us for this very plain reason, that the case of *Coverdale* v. *Charlton* (1) is inconsistent with that proposition in the breadth in which I have stated it. It appears to me that, in the case of *Coverdale* v. *Charlton* (1), the Court must be taken to have put a definition on the word, "street;" and though some parts of that definition may not have been necessary to the decision of the case actually before them, I cannot help thinking that that decision must be treated as binding upon the same Court when sitting in another case. I think it is not the right way to treat a judgment to consider, when it contains a definition of words in a statute, whether every portion of that definition was necessary to the case in hand. I will state shortly what I conceive to have been the decision in that case, at any rate of the majority of the Court, I mean of Lord Bramwell and the present Master of the Rolls; Lord Justice Cotton's judgment appears to me to be somewhat less express on the point. When one considers what a street is, and the interest of bodies like boards, who have

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the management of streets, it is evident that there is a certain area, which is ordinarily used for the purposes of the street. That will include of course the surface of the street; it will include a certain though undefined distance below the surface of the street, and another undefined distance above the surface of the street. That is what has been called in the course of this discussion the "area or zone of ordinary user." It is equally apparent that above and below that area there will be other areas or zones, from which interference may take place with the street. Let me take the case of what is below. It is quite plain that below the ordinary depth, in which the board would require to make any excavation for the purposes of the street, beds of coal or other minerals may exist, the removal of which might imperil the safety and convenience of the street. Now, was it the intention of the legislature to vest that area as well as the area of user? That is a question which I will refer to by-and-bye. In the same manner above the area in which the street is used above its surface, there will be another zone or area from which a possible interference might take place. It is quite evident there may be above the street—above that height which is ordinarily used—something which may imperil the convenient user of the street. Suppose, for instance, something were erected over the street which might cause inconvenience by things falling from it; and, in fact, the wire in question is an illustration of a possible source of danger to a street, arising from an object above the ordinary space which is used for the purposes of the street. Now was it the intention of the legislature, when vesting the street in the board, to vest in them these areas of possible interference with the street, both above and below the area of the ordinary user of the street? It appears to me that that question has been answered by the decision of the majority of the Court, in the case of *Coverdale* v. *Charlton* (1), because the ratio decidendi of two of the learned judges who delivered judgment in that case was this, as I read it, that the "street," which is vested by the Act in the board includes the area of ordinary user, and nothing more; and, therefore, they excluded from their definition the areas of possible interference. I repeat that it appears to me that when a defini-

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tion has been given of words in an Act by the Court of Appeal as the ground of a decision, it is not for the Court of Appeal, sitting in another case, to overrule that definition. Therefore, in the present case, I feel myself bound by the definition of the meaning of the word "street" as laid down by the majority of the Court in *Coverdale* v. *Charlton*. (1) I think that the Court has plainly negatived the idea that the area of possible interference in the subjacent soil passes to the board. They have said that it is the surface, not the minerals to any depth, which passes to the board, and therefore it appears to me to follow that they confined the definition of "street" to the area of ordinary user. It is quite true that no words are to be found in the judgments which deal explicitly with the area of possible interference above the surface, but the principle of the decision, which confines it to the area of ordinary user, must apply above as well as below the surface. Therefore, I have come to the conclusion that the true definition of "street" as laid down by the majority of the judges in that case, must be taken to be that it vests some proprietary right in the area of ordinary user, and nothing more. Is this wire within that area of ordinary user? It appears to me on the evidence that it plainly is not; and, therefore, I think the plaintiffs have failed to shew any proprietary right in the space which is occupied by the wire. I wish to observe that in coming to this conclusion I am not expressing the slightest doubt with regard to the rights of the ordinary proprietors of land. That question is not before us. As at present advised, I entertain no doubt that an ordinary proprietor of land can cut and remove a wire placed at any height above his freehold; the point is one not necessary for decision. I wish to observe, further, that I am not in this case deciding anything with regard to the rights of the adjoining proprietors, who may be the owners of the subsoil of the "street," to interfere with any person, who may pass a wire across the stratum of air above the "street," provided it passes above the area of ordinary user. For anything I know or intend to determine in the present case, that column of air may be vested in the proprietors of the subsoil. Those are points on which I express no opinion in the present case: I only

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desire to say. I am not expressing an opinion adverse to the rights of those persons.

Only one other observation remains, which is this: it has been contended before us that the plaintiffs have a statutory power of preventing the construction of any wire across their "streets" under the 12th section of the Telegraph Act, 1863. It appears to me to be plain that in terms that Act applies only to those companies, which are constituted by Act of Parliament for the purpose of telegraphic business. It has been contended that by reason of the incorporation of the Act of 1863 with the subsequent Act of 1868, and of the incorporation of the Act of 1868 with the Act of 1869, and of the definition clause contained in the Act of 1869, every telegraphic company within the Act of 1869 is brought within the prohibition of the Act of 1863. I confess that I had some difficulty in following that argument, and I come to the conclusion that it is untenable.

I think, therefore, that the learned judge in the court below, although he proceeded, in my view, entirely on the right lines, erred when he came to apply the case of *Coverdale* v. *Charlton* (1), and, intending to follow that case, extended the area which was vested in the board of works beyond the area of user, and made it include the area of possible interference. That is the precise point in which, in my judgment, the learned judge went wrong; and it follows that the judgment must be reversed, and judgment must be entered for the defendants with the costs of the action.

Judgment for the defendants.

Solicitors for plaintiffs: *Corsellis, Son & Mossop.*

Solicitors for defendants: *Waterhouse, Winterbotham & Harrison.*

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J. E. H.

[IN THE COURT OF APPEAL.]

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May 29.

THE WEST BROMWICH SCHOOL BOARD, APPELLANTS; THE OVERSEERS OF WEST BROMWICH, RESPONDENTS.

Poor-rate—Rateable Value—School Board—Public Elementary School—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75).

A school board are rateable to the relief of the poor in respect of a public elementary school occupied by them, whether they are owners or lessees of the site thereof.

CASE stated by the justices of Staffordshire at Quarter Sessions on an appeal against a poor-rate.

The appellants are the school board constituted under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), for the parish of West Bromwich in the county of Stafford.

The respondents are the churchwardens and overseers of the poor of the parish of West Bromwich, and the assessment committee of the West Bromwich Union.

By 33 & 34 Vict. c. 75, s. 18, the school board shall maintain and keep efficient every school provided by such board, and shall from time to time provide such additional school accommodation as is in their opinion necessary in order to supply a sufficient amount of public school accommodation for their district.

By s. 19, every school board for the purpose of providing sufficient public school accommodation for their district, whether in obedience to any requisition or not, may provide, by building or otherwise, school houses properly fitted up, and improve, enlarge, and fit up any school house provided by them, and supply school apparatus and everything necessary for the efficiency of the schools provided by them, and purchase and take on lease any land, and any right over land, or may exercise any of such powers.

By s. 53 the expenses of the school board under this Act shall be paid out of a fund called the "School Fund." There shall be carried to the school fund all moneys received as fees from scholars, or out of moneys provided by Parliament, or raised by way of loan, or in any manner whatever received by the

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school board; and any deficiency shall be raised by the school board as provided by this Act.

By s. 54 any sum required to meet any deficiency in the school fund, whether for satisfying past or future liabilities, shall be paid by the rating authority out of the local rate.

The West Bromwich School Board under the powers of the Education Act, 1870, purchased the sites of and erected three elementary schools [described in the case]. They also purchased two other schools [described in the case]. The total cost of the above-mentioned schools was 24,633*l.*

These sites and schools were respectively conveyed to them in accordance with the Elementary Education Act, 1870, "unto and to the use of the said school board, their successors and assigns, for ever, and so that the same land, hereditaments, and premises shall be held upon trust for the purpose of a public elementary school within the meaning of the Elementary Education Act, 1870, and for or toward the provision in manner thereby authorized of sufficient public school accommodation for the aforesaid district, and for no other purpose whatsoever."

The school board also rent the following schools [described in the case], under agreements made by the school board with the respective owners. Those agreements were set out in an appendix to the case. Each of them contained a provision that the buildings rented should be used only for the purpose of a public elementary school.

Neither the school fees, nor the moneys provided by Parliament, nor moneys raised by way of loan (if any), or in any manner whatever received by the school board, have, without contribution from the rates, been sufficient to meet the ordinary and reasonable expenses of the school board; and there has in every year been a deficiency in respect of which the school board have been compelled to require a rate to be levied, which deficiency has been made good out of such rate in accordance with the Act.

In the valuation list for the parish of West Bromwich the schools and premises owned and occupied by the appellants were assessed as follows:—[The assessment was set out, the schools erected and purchased, and the schools rented, being respectively assessed at substantial sums.]

On the 1st of July, 1882, a rate and assessment for the relief of the poor of the parish of West Bromwich, and for other purposes chargeable thereon, was made after the rate of 1*s.* 4*d.* in the pound on the above-mentioned property of the appellants, such rate being made on the basis of the said valuation list.

The appellants contend that under the circumstances they have no occupation of the schools and premises specified, nor any beneficial occupation, nor could any tenant under the same restrictions have any beneficial occupation of any of the schools and premises.

The appellants being dissatisfied with the decision of the assessment committee assessing the school board's property at the sums specified in the valuation list, gave a notice of appeal to the court of quarter sessions.

The appeal being called on for hearing before the Court of Quarter Sessions, the rate was by consent of the parties confirmed subject to this case.

The questions for the opinion of the Court were:—

Whether the appellants under the circumstances aforesaid were rateable to the relief of the poor in respect of the said schools and premises, or any of them?

And whether they were entitled to any relief from the Court of Quarter Sessions?

If the Court should be of opinion that the appellants were rateable in respect of the schools and premises or any of them, or that the appellants were not entitled to relief from the Court of Quarter Sessions, the order of the Court of Quarter Sessions was to stand, but if the Court should be of opinion that the said schools and premises, or any of them, were not rateable, and that the appellants were entitled to relief from the Court of Quarter Sessions, the said order was to be quashed in whole or part as the Court should direct, and the rate amended accordingly.

Dec. 11, 18, 1883. *Anstie, Q.C.* (*John Rose* with him), for the appellants. The appellants were not liable to be rated for the relief of the poor in respect of the occupation of their schools. They were a public body properly exercising for the benefit of the community powers given to them by the statute under which

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they were constituted. They can only be rated in respect of the profit (if any) they are entitled to make subject to the restrictions of that statute. They were not liable to be rated on the basis of the profit a hypothetical tenant, subject to no such restrictions, would make in respect of his occupation of the same premises for the same purpose. The hypothetical tenant here is the statutory tenant. He must be treated as an occupier subject to the limitations and restrictions imposed by the statute, and as liable to be assessed upon that basis only. That principle is clearly enunciated in *Corporation of Worcester* v. *Droitwich Assessment Committee* (1) which governs the present case.

[MATHEW, J. In the *Droitwich Case* (1) the Court did not hold that the property was exempt from rateability. The land, upon which the reservoir was constructed, was of course rateable up to the time the reservoir was constructed, and in my view continued so afterwards, but the reservoir itself had no value except that which the Act conferred upon it. It was in the category of barren land, having no value per se.]

In the present case it is contended, not that the property is not rateable, but that the occupation of the property being restricted by statute, there is no beneficial occupation—no valuable thing to assess. The appellants are within the category of the exception which Blackburn, J., suggested in *Mersey Docks* v. *Cameron* and *Jones* v. *Mersey Docks* (2). He says (at p. 461): "Though the words of this enactment" (the statute of Elizabeth) "might seem to give the overseers a discretion to tax each inhabitant in such arbitrary sum as they might think fit, it has long been settled that the taxation of the different persons must be equal, and in proportion to their respective means;" and, after discussing whether the case ought to be treated as raising the issue of no occupation, or of no beneficial occupation, he proceeds: "Whichever may be the true mode of enunciating the position, it is clear that there can be no valid rate unless the occupation is such as to be of value; and if the words 'beneficial occupation' are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the Bar), it is clear

(1) 2 Ex. D. 49. (2) 11 H. L. 443.

that a beneficial occupation is essential as the foundation of the rate; but it is equally clear that, if the phrase is to be understood in this limited sense, the trustees have a beneficial occupation, for they actually occupy land as docks, and in virtue of that occupation receive payments from the shipping using the docks; at present greatly in excess of what is necessary to maintain the docks. Hereafter the charges on shipping may be reduced so as greatly to diminish the revenue derived from this occupation; possibly at some future time to render it no greater than the sum requisite to maintain the docks; but whilst the dues on shipping are maintained at their present rate, it is clear that the hypothetical tenant would give for the occupancy of the docks, as at present enjoyed by the trustees, a rent greatly in excess of what would be necessary to maintain the docks in a state to command that rent." Those passages, it is submitted, imply that if the charges were so reduced by statute as only to afford what was necessary for the maintenance and repair of the docks, there could be no beneficial occupation and no valid rate, because there could be nothing in respect of which such a rate could be laid. That opinion of Blackburn, J., was fully accepted by the House of Lords. Lords Westbury and Cranworth express their view of what is meant by beneficial occupation in the same sense. The case of *Overseers of Chorlton-upon-Medlock* v. *Guardians of Chorlton Union* (1) is in conflict with the *Droitwich Case* (2), and should not be followed. The case of the *Corporation of Peterborough* v. *Overseers of Wilsthorpe* (3) is directly in point in favour of the contention for the appellants.

[He also cited, *Mayor of Liverpool* v. *Overseers of Wavertree* (4); *Reg.* v. *Metropolitan Board of Works* (5); *Metropolitan Board of Works* v. *Overseers of West Ham* (6); *Mersey Docks* v. *Liverpool* (7); *Hare* v. *Overseers of Putney* (8).]

(1) 51 L. J. (Q. B.) 458; 47 L. T. Rep. 96.

(2) 2 Ex. D. 49.

(3) 31 W. R. 949. On appeal the judgment of the Queen's Bench Division was affirmed on the ground that the question was concluded by authority. See 12 Q. B. D. 1, where the case is reported upon another point.

(4) Reported in a note to *Corporation of Worcester* v. *Droitwich Assessment Committee*, 2 Ex. D. at p. 55.

(5) Law Rep. 4 Q. B. 15.

(6) Law Rep. 6 Q. B. 193.

(7) Law Rep. 9 Q. B. 84.

(8) 7 Q. B. D. 223.

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Jelf, Q.C., and *A Young*, for the respondents, were not heard.

LORD COLERIDGE, C.J. Nothing could have been better done than the argument of the appellants' counsel, but I am of opinion that, after the decision of the House of Lords in *Mersey Docks* v. *Cameron* and *Jones* v. *Mersey Docks* (1), it is in vain to address that argument to the Court. Were the matter res integra, there is much to be said in favour of Lord Mansfield's view. [See *The King* v. *St. Luke's* (2) and *The King* v. *St. Bartholomew's* (3).] Independently of his own great authority, there was sense and substance in that view, and it was adopted by Lord Kenyon and followed by Lord Ellenborough. Finally, the question whether Lord Mansfield's view could be maintained in principle upon the words of the statute of Elizabeth, came to be discussed by the House of Lords in the *Mersey Docks Cases*, and the judgment of Blackburn, J., in those cases is remarkable as being a judgment delivered by a great lawyer in direct opposition to the judgment he had delivered in the court below. The learned judge admitted that he had changed his mind, and was unable to maintain the view which he had maintained in the Court of Exchequer Chamber. His judgment, in answer to the questions put by the House of Lords, is therefore of great authority in itself; it expressed the view of all the judges with the exception of Byles, J.; and it was adopted in terms by Lord Westbury, Lord Cranworth, Lord Chelmsford, and Lord Kingsdown, who decided the case in the House of Lords. The principle laid down, as stated by the Lord Chancellor, Lord Westbury, is that it is not necessary that the occupation should be beneficial to the occupier; it is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings. He differs from the view of Lord Mansfield that if valuable property be in the occupation of trustees who are bound to apply the whole of it to public, but not governmental, purposes, they are not liable to be rated in respect of that property. Further he proceeds to state what is, in his opinion, the true principle,—"that the only ground of exemption from the statute of Elizabeth is that which

(1) 11 H. L. C. 443. (2) 2 Burr. 1053.
(3) 4 Burr. 2435.

is furnished by the rule that the Sovereign is not bound by that statute; and that consequently, when valuable property (that is, property capable of yielding a net rent above what is required for its maintenance) is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country, and therefore are to be deemed part of the use and service of the Crown." Then Lord Cranworth says it was contended "that though they (the trustees) are occupiers, their occupation is not a beneficial occupation; and the statute, it was contended, contemplated only such an occupation as is beneficial to the occupier, or to some other person or persons for whose behoof the occupier is occupying." He proceeds: "If by beneficial occupation is meant any occupation of something valuable—something in its own nature beneficial to some one—I think it is fair to consider that would be impliedly included in the statute. It was not meant to impose the duty of contributing to the relief of the poor on any one merely because he might be the occupier of a barren rock, neither yielding, nor capable of yielding, any profit from its occupation. But I can discover nothing, either in the words or in the spirit of the Act, exempting from liability the occupier of valuable property, merely because the profits of the occupation are not to be enjoyed by him, or by any on whose behoof he is occupying, but are to be devoted to the benefit of the public." It seems to me that the passages I have read are conclusive in this case. Here we have an occupation of property unquestionably capable of being valuable in somebody's hands, because the school board themselves pay rent for it. The facts, therefore, in the present case shew that the property in the hands of an ordinary tenant is capable of producing a profit,—a profit to the occupier because he is willing to pay rent for its occupation. The property, therefore, being manifestly in itself and in its nature valuable, there is no ground within the decision of the House of Lords to exempt the occupier from rateability, and the question whether or not it is liable to be rated must be decided against the appellants.

It is suggested that the principle of the judgment of the House of Lords has been qualified by subsequent decisions. Two cases

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were mainly relied upon to support that view: *Mayor of Worcester* v. *Droitwich Assessment Committee* (1), and *Corporation of Peterborough* v. *Overseers of Wilsthorpe* (2). It has already been pointed out by Mathew, J., during the course of the argument, that the decision in the *Droitwich Case* (1) was not intended in any degree to qualify or impugn the decision in the *Mersey Docks Cases* (3). The *Droitwich Case* (1), as I understand it, was properly decided. A piece of land, in itself of very small (if any) rateable value, has a large added value given to it by Act of Parliament, becoming the reservoir of the waterworks of a great company. But the same power which adds to the value of the piece of land by the very same instrument takes away that which, primâ facie, it has given, because the Act provides that, although the piece of land be occupied for the purpose of a reservoir, the water shall be delivered to consumers at such a price that the occupation, otherwise valuable in itself, is made comparatively valueless by the same statute which created it. The principle of the decision in the *Mersey Docks Cases* (3) was fully acknowledged, and intended to be acted upon, but the Court held that the occupiers of the reservoir could only be rated in respect of the small rateable value which the land had apart from the statute. With respect to the case of the *Corporation of Peterborough* v. *Overseers of Wilsthorpe* (2), I confess I do not know whether I have quite mastered the grounds upon which the decision went, but it could not have been intended to overrule the judgment of the House of Lords in the *Mersey Docks Cases.* (3) If the decision simply is that, as a matter of fact, the occupiers were the occupiers of what Lord Cranworth calls "a barren rock," neither yielding, nor capable of yielding, any valuable result, then no doubt it is perfectly good law. If, on the other hand, the decision is that, because the occupation of a thing valuable in itself chances not to be valuable in the hands of particular occupiers because they are occupying for public purposes and can make no personal profit out of it, then, with all respect to the learned judges who decided the case, I say that it directly conflicts with the judgment of the House of Lords. Between the

(1) 2 Ex. D. 49. (2) 31 W. R. 949.
(3) 11 H. L. C. 443.

authority of the House of Lords and the authority of that case, difficult in itself of comprehension, there can be no possible choice. We are bound by the judgment of the House of Lords, even if we do not agree with it, which, for my own part, I am quite disposed to do. Simplicity in these rating cases is of infinite value, and the rule given by the House of Lords is, in my opinion, perfectly simple and intelligible, and, if carried into effect throughout the country, will work with perfect fairness. It is excessively important, therefore, that it should not in any degree be qualified or frittered away. I think that our judgment in the present case should be for the respondents.

STEPHEN, J. I am of the same opinion. I agree fully with the judgment of my Lord. I may, however, add one observation, tending to shew that the result of the Court's decision in this case will work fairly. If the school board are exempted from rateability, so much rateable value will be taken away from the parishes in which the various schools stand. If the schools are rated for the relief of the poor, the school board will have to pay that rate out of the education rate. It is not a case merely of taking money from one pocket to put it into another. Inasmuch as the education rate affects an area considerably larger than the area of the parish in which the schools stand, the effect will be that the poor-rates in respect of the schools in the parish will ultimately be paid by those who derive benefit from the objects for which the education rate is expended. That result is, I think, obviously a just one. It is always very satisfactory, when a decision upon the construction of the terms of a statute has been arrived at by considering the decided cases and the rules laid down by high judicial authority, to find that in applying that construction and those rules to the particular matter before the Court, they work out what one would otherwise be disposed to consider a just and proper result.

MATHEW, J. I am of the same opinion. The appellants are persons representing a particular locality empowered by statute to acquire for the purpose of their schools property capable of beneficial occupation. It was argued that the occupation was not

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beneficial in the sense of being profitable, and therefore that the appellants were not liable to be rated in respect of it. It is impossible, I think, to accept that position without implying that the conclusion arrived at by the House of Lords in the *Mersey Docks Cases* (1) was wrong. The fact that the property is capable of beneficial occupation seems to me to be a criterion under the Parochial Assessment Act of its assessable character. Various cases were cited by counsel for the appellants in order to establish that a new principle should be applied to the present case, involving a fresh exception to the rule laid down by the House of Lords. With respect to the case of *Metropolitan Board of Works* v. *West Ham* (2), it seems to me that this Court could not decide in favour of the contention for the appellants without overruling a material portion of that case; there the Court held that the structures occupied by the board in connection with the sewers, had a rateable value because they were capable of beneficial occupation. The statute provided that those structures should be devoted for all time to a particular purpose, involving no return to the board in the shape of money, but involving a return in the shape of money's worth.

The distinction between this case and *Corporation of Worcester* v. *Droitwich Assessment Committee* (3); and *Mayor of Liverpool* v. *Overseers of Wavertree* (4), seems to me obviously that pointed out by my Lord. In each of those cases the property sought to be rated would have had no value, would have been capable of no beneficial occupation, except for the statute which enabled certain charges to be collected in respect of the use of that property. The decisions were that you cannot have a hypothetical tenant where the only possible tenant is a statutory tenant, and where that statutory tenant can only derive from his occupation certain returns limited by statute. In such a case the assessable value is to be calculated upon those returns. It is most worthy of notice that in neither case did the Court hold that the property in question had no assessable value. I am dealing only with the question of principle; and the principle laid down was that you treat the property as in possession of a tenant whom you could

(1) 11 H. L. C. 443.
(2) Law Rep. 6 Q. B. 193.
(3) 2 Ex. D. 49.
(4) 2 Ex. D. 55, n.

charge for its use. The judgment of Mellish, L.J., in the *Droitwich Case* (1) makes it perfectly clear that that was the ratio decidendi. He compares the case to that of a railway company restricted by statute to certain tolls and charges. It would be unreasonable and absurd to assess a railway upon the footing that a tenant might occupy it from year to year and charge what he chose. We were much pressed with the case of *Corporation of Peterborough* v. *Overseers of Wilsthorpe*. (2) I respectfully dissent from that case. I see no trace in the statute by which the school board was empowered to acquire this property of any intention on the part of the legislature that it should be acquired without bearing its proper charges in respect of the poor-rate. If the legislation had that effect it might involve considerable injustice in particular cases. As long as relief is administered upon the parochial system, the whole of the property in the parish bears the burthen of maintaining the poor. If you take away a portion of that property by destroying its assessable character, you increase the burthen of the other occupiers in the parish for the purpose of benefiting the rest of the community. It may be fairly presumed that the legislature did not intend a consequence so grossly inequitable. The intention of the legislature was, and the result of the decisions has been, to cast upon the general rate the poor-rate to be paid in a particular locality. For these reasons I am of opinion that the judgment of the Court should be in favour of the respondents.

W. A.

The school board appealed.

1884. May 29. *Alfred Wills, Q.C.*, and *John Rose*, for the West Bromwich School Board. By the Parochial Assessment Act (6 & 7 Wm. 4., c. 96), s. 1, every rate for the relief of the poor is to be made upon an estimate of the net annual value of the hereditaments therein comprised, that is, of the rent at which they might reasonably be expected to let from year to year, subject to certain deductions. The question in the present case is whether the buildings of the school board are liable to be rated at any amount; it is submitted that they are not so liable, and that they ought to be rated

(1) 2 Ex. D. 49. (2) 31 W. R. 949.

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at nothing. School boards are constituted under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), and the Acts amending it, and by s. 30, sub-s. 1, they are declared to be bodies corporate with power to hold land; but this circumstance does not render them liable to be rated. They make no profit from the land occupied by them for school purposes, and therefore they do not fall within the doctrine laid down by the House of Lords in the *Mersey Docks* v. *Cameron* (1), and *Jones* v. *Mersey Docks* (2). Those cases, no doubt, contain the rules which must be applied in rating land used for public purposes, from which the occupiers derive no benefit; but a limitation upon those rules is pointed out in *Corporation of Liverpool* v. *Overseers of Wavertree* (3), namely, that where a public body is restricted by statute from earning the profit which the land belonging to them might under other conditions produce, they are to be rated only upon the basis of the amount actually earned. This limitation was accepted to its full extent by the Court of Appeal in *Corporation of Worcester* v. *Droitwich Assessment Committee* (4). It is also in effect laid down by Brett, L.J., in *Hare* v. *Overseers of Putney* (5) that if there can be by law no benefit to the occupier, there can be no beneficial occupation, and no rate can be levied. It must be admitted that *Reg.* v. *Metropolitan Board of Works* (6) and *Metropolitan Board of Works* v. *West Ham* (7) are adverse to the argument for the school board, so far as they shew that land occupied for public purposes and producing no profit is rateable; but they are not reconcilable with the later decisions already mentioned. *Overseers of Chorlton-upon-Medlock* v. *Guardians of Chorlton Union* (8) perhaps may be distinguished from the *Corporation of Worcester* v. *Droitwich Assessment Committee* (4); but if it cannot, it is not to be followed as an authority. Whatever may be the tenure of the land occupied by the school board, it is equally exempt from liability to be rated: it is a necessary implication from the Elementary Education Acts that school boards shall make no profit; and it would be an unsatisfactory state of the

(1) 11 H. L. C. 443.
(2) 11 H. L. C. 443.
(3) 2 Ex. D. 55, note.
(4) 2 Ex. D. 49.
(5) 7 Q. B. D. 223, at pp. 333, 334.
(6) Law Rep. 4 Q. B. 15.
(7) Law Rep. 6 Q. B. 193.
(8) 51 L. J. (Q. B.) 458; 47 L. T. (N.S.) 96.

law if they should not be rateable for land whereof they are tenants in fee, and should be rateable for land of which they are only tenants for years. Under 43 Eliz. c. 2, the occupiers of land in a parish are to be rated according to their ability, and the Parochial Assessment Act introduces no fresh principle, but merely provides the machinery for rating. Express words are not required to create an exemption from rateability. If the schools are to be rated, the result will be that the poor will have to pay more for the education of their children: this is a result opposed to the policy of the Elementary Education Acts.

A. R. Jelf, Q.C., and *L. C. Jackson*, for the Overseers of West Bromwich, were not called upon to argue.

BRETT, M.R. This is a question whether a school board can be rated in respect of premises occupied by them. There are two classes of property: the one belongs to them as owners, the other as tenants to other persons. Can they be rated in respect of either or both? We must try to state the rule; but I despair of arriving at quite an accurate statement. When can a person be rated in respect of property? He can be rated only as having a beneficial interest. When has property a beneficial value? When a hypothetical tenant can be found to pay rent for the land. The question is whether the owner can himself obtain a tenant who will pay rent. Would the property fetch money in the market if the owner wished to let it? If he could let it only on terms that would give no benefit, no one would occupy. But if the hypothetical tenant could obtain benefit, but merely for his own purpose did not choose to do so, the premises might be said to have a potential value. I have tried to combine what I said in *Hare* v. *Overseers of Putney* (1) and what Cave, J., said in *Overseers of Chorlton-upon-Medlock* v. *Guardians of Chorlton*. (2) If the property has no rateable value, it must be rated at nothing. As to property which the school board rent, could the owner find a tenant who would pay him any rent? That depends on the benefit to be derived from the occupation. In the present case the property might be let to a person who would pay rent, because the school board themselves pay rent. It is said that the building

(1) 7 Q. B. D. 223. (2) 51 L. J. (Q.B.) 458.

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has no beneficial value to the school board. That is not the test. The question is whether the owner could find a hypothetical tenant to pay rent. It is clear he could. Then as to the land of which the school board are owners. If they could use it only in a way which would not produce to them an income beyond the expenses, in their hands it would have no beneficial value: if they had no power to let it, they could have no tenant, and if a tenant can have no power to use it in any profitable way, the hypothetical tenant will have no valuable occupation. That was the principle of the *Corporation of Worcester* v. *Droitwich Assessment Committee*. (1) In some instances a corporation are empowered to buy land out of which they are forbidden to make a profit; for the rates were to be diminished, and the corporation have no power to make a profit; and the hypothetical tenant must remain in the same position. There would be no beneficial value, and no one could be rated in respect of the property. To apply that rule, suppose no power of leasing: are the school board prevented from making any profit? It is said that the scope of the Acts prevents them from making any profit, because the fees are to be diminished whenever it is possible. If that were so, the case would be within the doctrine; but we ought to be careful how we imply an intention of that kind; and even although it may be a casus omissus, we ought not to imply it. But it is unnecessary to decide it. In this case there is a power to lease: Elementary Education Act, 1870, s. 22: there may be conditions such as the consent of the commissioners: nevertheless, the power to lease exists. That being so, the school board, being owners, could obtain a hypothetical tenant, and the land is rateable. As to both kinds of land the school board is rateable. The judgment of the Queen's Bench Division must be affirmed.

BOWEN, L.J. I am of the same opinion. The question is whether the school-board are rateable to the relief of the poor in respect of the school-house occupied by them? The first point to be determined is whether the school-house is capable of a beneficial occupation. I will assume that in the hands of the school-board it is not capable of being beneficially occupied; but

(1) 2 Ex. D. 49.

we must consider whether it is capable of being beneficially occupied in the hands of any other person. If land is by law struck with sterility when in any and every body's hands, so that no profit can be derived from the occupation of it, it cannot be rated to the relief of the poor. But if the school-house is not used by this school board for any profitable purpose, it by no means follows that the site of it must be sterile in every other person's hands. In *Corporation of Liverpool* v. *Wavertree* (1) it appears to have been assumed that the land, upon which the waterworks had been built, could not be used for any other purpose than that for which it was actually used. In *Corporation of Worcester* v. *Droitwich Assessment Committee* (2) the judgments of both the High Court and the Court of Appeal are based upon the ground that the occupiers of land otherwise rateable were restricted by statute from using it for profitable purposes. The *Corporation of Peterborough* v. *Stamford Union* (3) was decided upon the same principle, and in *Hare* v. *Overseers of Putney* (4) the judgments turned upon the same principle. In the latter case the Metropolitan Board of Works could hardly be said to be occupiers of Putney bridge; and if they had been, the restrictions imposed by statute were such that there could be no beneficial enjoyment by anybody. In *Reg.* v. *Metropolitan Board of Works* (5) it was held that the defendants were not exempted by statute from rateability, and therefore that they were rateable in respect of a wharf, engine-house, and pumping-station, but that they were not rateable in respect of sewers, which were not the subject of a beneficial occupation, and were not capable of yielding any profit. In *Metropolitan Board of Works* v. *West Ham* (6) also it was held that sewers were not rateable, but that the pumping-stations were. In this latter case Hannen, J., appeared to doubt whether the pumping-stations were rateable; but the other judges present, Mellor and Lush, JJ., were clearly of opinion that the pumping-stations were rateable. In *Overseers of Chorlton-upon-Medlock* v. *Guardians of Chorlton Union* (7) the

(1) 2 Ex. D. 55, note.
(2) 2 Ex. D. 49.
(3) 31 W. R. 949.
(4) 7 Q. B. D. 223.
(5) Law Rep. 4 Q. B. 15.
(6) Law Rep. 6 Q. B. 193.
(7) 51 L. J. (Q. B.) 458; 47 L. T. (N.S.) 96.

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judges of the Queen's Bench Division did not intend to dissent from *Corporation of Worcester* v. *Droitwich Assessment Committee.* (1) None of the cases cited are in conflict with the principle I have referred to. What is the nature of the sterility with which the land belonging to the school board is struck? The premises rented by the school board are certainly not struck with sterility to all time. Nor do I think the freehold land is so struck. It was bought under the powers of the Lands Clauses Consolidation Act, 1845, the provisions of which as to the conveyance of land are to be read into the Elementary Education Act, 1870, s. 21. The land is now held, it is true, for the purposes of the school board; but the school board may shift from their premises, and then the land belonging to them might be occupied by a new occupier either as tenant or as purchaser under the board: could he be discharged from liability to be rated? I think that he could not; for his occupation would be beneficial. The lands, therefore, are capable of beneficial occupation and fall within the principle of the rating statutes. The judgment of the Queen's Bench Division was right.

FRY, L.J. I can very briefly state my views, which concur with those of the other members of the Court. By 43 Eliz. c. 2, every occupier of land within a parish is to be rated according to his ability. By the Parochial Assessment Act (6 & 7 Wm. 4, c. 96), s. 1, land is to be rated upon an estimate of its net annual value, that is, of the rent at which it might reasonably be expected to let from year to year. All land within a parish is to be rated upon this principle, unless no estimate can be formed as to its annual value. I may mention, by way of example, land which has been rendered desolate by the eruption of a volcano and which can be turned to no profitable use. But there is another class of cases where the land can by reason of some statute be turned to no profitable purpose. It stands upon the same footing as if it had been rendered desolate by a volcano, and no profit can be gained from it. But where the occupier of land, although he himself is forbidden to make a profit of it,

(1) 2 Ex. D. 49.

may nevertheless let it so as to make a profit of it, the land is not struck with sterility; though no profit may be derived from it in the hands of a particular occupier. The fact that the land earns no profit, does not prevent an estimate of its rental being made. This consideration disposes of the land rented by the school board.

Then as to the land of which the school board are owners, it is true that they themselves can make no profit out of it whilst they occupy it; nevertheless they may let it: nothing obliges them always to occupy it. So long as it is occupied by them, it is not to be turned to profit; but after their occupation has ceased, any person may use it for a profitable purpose. I wish to repeat that although I come to this conclusion that the land occupied by the school board is rateable, they are not able, in my opinion, to make any profit of it. I think that an implied prohibition is contained in the Elementary Education Acts against any school board making a profit.

Appeal dismissed.

Solicitor for appellants: *Needham*, for *Caddick*, West Bromwich.

Solicitors for respondents: *Rowlands, Bagnall, & Co.*, Birmingham.

J. E. H.

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Jan. 30.

[IN THE COURT OF APPEAL.]

DYSON AND OTHERS, APPELLANTS; THE LOCAL BOARD FOR THE DISTRICT OF GREETLAND, RESPONDENTS.

Local Government—Rates—Local Board—Urban Authority—Highway Rate—Surveyors of Highways—Limit upon Amount of Highway Rate—Highway Act, 1835 (5 & 6 *Wm.* 4, *c.* 50), *ss.* 5, 29—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 144, 216, 217.

The respondents were the local board for the district of G. Part of their district, called the outer district, was not rated for works of paving, water supply, and sewerage. The respondents under the Public Health Act, 1875, ss. 216, 217, made a highway rate of 3*s.* 4*d.* in the pound upon the inhabitants of the outer district, whose consent to the rate had not been obtained:—

Held, that, although the local board were surveyors of highways within the outer district, pursuant to the Public Health Act, 1875, s. 144, yet the limit imposed upon rates made by surveyors of highways under the Highway Act, 1835, s. 29 (10*d.* in the pound for one rate and 2*s* 6*d.* in the pound for one year) unless the consent of the parishioners had been obtained, did not apply to the highway rates made by a local board pursuant to the Public Health Act, 1875, ss. 216, 217, and that the rate of 3*s.* 4*d.* in the pound made by the respondents was valid.

SPECIAL CASE stated pursuant to the Public Health Act, 1875 (38 & 39 Vict. c. 55), of which the following are the material portions:

In pursuance of an order of one of Her Majesty's Principal Secretaries of State, dated the 11th of March, 1865, the Local Government Act, 1858, was adopted, and came into force within part of the hamlet of Greetland, in the parish of Halifax, in the West Riding of Yorkshire, which part is hereinafter referred to as the "inner district." The district, so constituted a local government district, was at the time of making the rate hereinafter mentioned an urban district within the meaning of the Public Health Act, 1875, and the respondents are the local board of health thereof. Another part of the hamlet of Greetland, which is hereinafter referred to as the "outer district," was by the terms of the order of the Secretary of State excluded from the operation thereof, and was under the jurisdiction of the rural sanitary authority of the Halifax Union for sanitary purposes. The appellants were occupiers of lands and tenements situate

within the "outer district," which had not been formed into a separate highway district, nor had it been included in any highway district under the Highway Acts. The hamlet of Greetland was a part of a parish within the meaning of the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 5. The respondents, pursuant to powers granted to them, borrowed money for the purposes of works of water supply and sewerage within the inner urban district, and had provided works of that kind, the expenses of which were charged on and defrayed out of the general district rate. In December, 1880, the respondents laid a highway rate of 2*s.* 6*d.* in the pound over the "outer district," and as the sum produced thereby was not sufficient for the payment of the expense of the highways therein, the respondents, on the 24th of November, 1881, issued a notice that a special meeting of the Greetland Local Board would be held on the 5th of December "for the purpose of laying a highway rate of 3*s.* 4*d.* in the pound upon property assessable thereto in that part of the district of Greetland outside the limits of the Greetland Local Board, but included in the district of the said board for highway purposes." This notice was duly posted at Greetland church and all places of worship in the inner district, and notice thereof was sent to every member of the board. There was no place of worship in the "outer district," and no vestry or vestry meeting. On the 5th of December the special meeting was held pursuant to the notice above-mentioned, and the following resolutions were unanimously passed: "That a highway rate of 3*s.* 4*d.* in the pound be laid upon property assessable to the repairs of highways in that portion of the township of Greetland beyond the limits of the Greetland Local Board, and which portion is included within the district of this board for highway purposes . . . . That the same be and is hereby declared laid, and be payable by two equal instalments, the first instalment to become due and payable on the 20th of December, 1881, and the second instalment to become due on the 20th of April, 1882." Notice that this rate had been laid was duly given and posted. Except as hereinbefore appears, no notice of a meeting specially called for the purpose of obtaining the consent of the inhabitants of the outer district, who contributed to the highway rate, had been given by

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the respondents, nor had any such meeting been held, and no consent of the inhabitants had been given. Towards payment of the first instalment of the rate of 3*s.* 4*d.* in the pound each of the appellants was assessed in respect of property situate in the outer district, and payments of the amounts of their respective assessments was demanded of the appellants on the 13th of January, 1882. The appellants gave to the respondents due notice of appeal against the rate, and the appeal was heard at the general quarter sessions of the peace for the West Riding of Yorkshire in April, 1882. On behalf of the appellants it was contended that the rate was improperly made and laid, and was invalid. The court of quarter sessions confirmed the rate subject to a case for the opinion of the Queen's Bench Division. If that Court was of opinion that the rate was properly made, the order of the court of quarter sessions was to be confirmed; but if otherwise, then the order was to be quashed.

The Queen's Bench Division (Field and Mathew, JJ.) affirmed the order of quarter sessions, but gave leave to appeal to the Court of Appeal. The appellants accordingly appealed.

Jan. 29. *Meadows White, Q.C.*, and *J. F. Moulton*, for the appellants. The question is whether a highway rate is bad, because it exceeds the limits of 10*d.* in the pound for one rate, and 2*s.* 6*d.* in the pound for one year, which were imposed by the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 29. The rate in dispute is assessed at 3*s.* 4*d.* in the pound, and the appellants contend that the respondents have no jurisdiction to levy a rate of that amount in the outer district without the consent of the inhabitants. A part of the hamlet of Greetland was constituted a district under the Local Government Act, 1858, and the statute now material is the Public Health Act, 1875. And by s. 216, sub-s. 2, where parts of an urban district are not rated for works of paving, water supply, and sewerage, the cost of repair of highways in those parts shall be defrayed out of a highway rate to be separately assessed by the urban authority as surveyors of highways. Part of the district of Greetland, that is, the outer district, is not rated for the purpose of paving, water supply, and sewerage, and consequently, the cost of the repairs of the highways

therein must be defrayed out of a separate highway rate. It is not assessed to the general district rate, which is imposed upon an urban district pursuant to the powers created by the Public Health Act, 1875, ss. 209, 210, 211; but the expenses of the repair of the highways within the inner district are defrayed out of the general district rate levied by the respondents. In order to ascertain the liabilities of the inhabitants of the outer district, reference must be had to the Highway Act, 1835 (5 & 6 Wm. 4, c. 50). By s. 27 the surveyor of highways is to make a rate; by s. 28 he is to have power to inspect the poor-rate; and by s. 29 the rate is to contain the names of the occupiers and the description of their property; but "no rate to be levied or assessed as aforesaid shall exceed at any one time the sum of 10*d.* in the pound, or the sum of 2*s.* 6*d.* in the pound in the whole in any one year; provided nevertheless, that with the consent of four-fifths of the inhabitants of any parish contributing to the highway rate assembled at a meeting specially called for that purpose, ten days' previous notice of the same having been given by the surveyor of the said parish, the rate to be levied and assessed as aforesaid may be increased to such sum as the said inhabitants so assembled may think proper." By s. 5 the outer district is a "parish" within the meaning of s. 29. And by s. 44 (now repealed by 41 & 42 Vict. c. 77, s. 9) the accounts of the surveyor were to be laid before the inhabitants and also before justices. These provisions are in effect incorporated in the Public Health Act, 1875, s. 144, which invests local boards with the powers, and makes them subject to the liabilities of surveyors of highways. Therefore the limit to the power of rating contained in the Highway Act, 1835, s. 29, is preserved when highway rates are made by local boards. That statute was a public Act, and therefore the abolition of limits as to rates imposed by local Acts, which is contained in the Public Health Act, 1875, s. 227, does not affect the present case. The limit contained in the Highway Act, 1835, s. 29, is repeated as to contributions for the expenses of highway boards contained in the Highway Act, 1862 (25 & 26 Vict. c. 61), s. 21, and although that enactment has been repealed by the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 32, the limit is reintroduced by s. 33

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of the latter statute. The whole point in the present case is whether the limit contained in the Highway Act, 1835, s. 29, is repealed by the Public Health Act, 1875, s. 216. It may be reasonable that the local board should have the power to rate the inhabitants of the inner district to an unlimited amount, because those inhabitants have elected the members thereof; but the inhabitants of the outer district have no voice in the election of the members of the local board, and it would be contrary to the principles upon which taxation is based, that an unrepresented body should be subject to be rated to an unlimited amount. Hence it may be quite proper to assess the inhabitants of the inner district to the amount of 3*s.* 4*d.* in the pound, but as to the outer district the limit of 10*d.* for one rate and 2*s.* 6*d.* for one year must be maintained. The legislation as to highways was settled in its present form before the legislation as to sanitary matters; and when a highway rate is made by a local authority, it must be assumed to be made in the same manner and subject to the same restrictions as a rate made by a surveyor of highways. Therefore, notwithstanding the Public Health Act, 1875, s. 217, it was necessary to obtain the consent of the inhabitants of the outer district before the limit contained in the Highway Act, 1835, s. 29, was exceeded. As this consent was not obtained, the rate appealed against was bad and ought to be quashed.

F. O. Crump, for the respondents, was not called upon to argue.

Cur. adv. vult.

Jan. 30. The following judgments were delivered:—

LORD COLERIDGE, C.J. In this case we do not think it necessary to hear any argument from the respondents' counsel. This was a dispute arising upon a rate, and the rate was appealed against, but was confirmed by the court of quarter sessions, and the order of the court of quarter sessions was brought up before the Queen's Bench Division for the purpose of being considered. A case had been stated, and the whole of the facts were laid before the Court, although the particular ground on which the rate was said to be bad does not in terms appear upon the face of the case. The point intended to be raised, is, however, clear enough, and

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the same point has been argued before us that was argued in the court below, and I will now shortly state it. This is a rate made by the local board of a hamlet called Greetland which is contiguous to the borough of Halifax, in respect of a portion of Greetland which has not itself obtained the full benefit of the operations of the local board, and in which there are no works of paving, water-supply, or sewerage. One part of the district of Greetland has for the purpose of distinction been called the inner district, and the other has been called the outer district. In the part of Greetland that has been called the inner district, there are works of paving, water-supply, and sewerage; but in the portion of Greetland in respect to which this question has arisen, there are no works of that kind. There is a local board, which contains within the ambit of its authority the outer district as well as the inner, and it is in respect of a rate amounting to 3*s.* 4*d.* in the pound laid by the local board upon the outer district of Greetland that the objection is raised, and upon this ground: The inhabitants admit that they are for certain purposes within the authority of the local board of Greetland, and that by the 144th section of the Public Health Act, 1875, the local board of Greetland are surveyors of Greetland for the whole district of Greetland, outer as well as inner; but they contend that inasmuch as the highway repairs as to inner Greetland are defrayed out of a general rate called the general district rate, and inasmuch as the purposes to which that general district rate are to be applied are not yet taking effect in the outer district of Greetland, the highway rate which is to be levied *eo nomine* on the outer district, is to be governed by different rules, and the authority of the local board in respect of it is to be limited by different considerations from those which govern the assessment and collection of the general district rate over such portions of the district as are within the operation of that rate, and in which the highways are only part of other works, namely, paving, water-supply, and sewerage works. The appellants urge that in respect of portions of districts in which there are no such works, as paving, water-supply, and sewerage, and in respect of which there is nothing but a highway rate, and where the local board act merely as surveyors of highways, they are to act exactly as if they were surveyors of highways only,

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and their powers and authorities are to be limited by the statutable limits which are imposed upon the surveyors of highways in an ordinary rural parish. That I understand is the substantial objection that is made to this rate, and there is no doubt from the sections which I will read in a moment that if that contention in point of law is correct, this rate cannot be supported, because a surveyor of highways could not levy more than 10*d.* in the pound in a single rate, and he never could levy more than 2*s.* 6*d.* in the pound in a single year, and here 3*s.* 4*d.* in the pound is levied by one rate to be enforced in one year; and, of course, the statement is enough to shew that if the Highway Acts are in force as to the powers of the local board under these conditions, what the local board for the district of Greetland have done, is in excess of their authority. But is that so? It is true that the Highway Act, the 5 & 6 Wm. 4, c. 50, after providing by the 6th section for the election of a surveyor, and as to what his powers shall be, enables him by the 27th section to make a rate and to do certain things in respect of it. It is to be signed by justices, and other provisions to be found in the Act are to be observed in respect to a rate so made by a surveyor so appointed. The 29th section goes on to state that "every rate shall contain the names of the occupiers, the description of the premises or property they occupy," and so forth, "and shall also specify the sum in the pound at which it is made;" and then these words, on which reliance is placed, occur, "and no rate to be levied or assessed as aforesaid shall exceed at any one time the sum of 10*d.* in the pound, or the sum of 2*s.* 6*d.* in the pound in the whole in any one year." Then there is a proviso that the inhabitants of the district, if they are gathered together in vestry and agree to it, can consent to be rated at a higher amount than that, if necessary; but I do not go into that proviso, because it is not suggested that consent has been asked for or given. That is the state of things which is still in existence in some places. The enactment is not repealed, because in many parts of the country, for practical purposes, portions of this Act are in operation, and where the 29th section itself is not in operation, that which is substituted for it is in operation. I speak of rural districts. The Highway Act, 1835 (5 & 6 Wm. 4, c. 50), was amended in many

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respects by the Act of 1862, 25 & 26 Vict. c. 61. That substitutes the election of waywardens and the collection of waywardens into boards called highway boards, and another kind of machinery was set in operation by that Act, into the details of which it is not in the least necessary for me to enter, but what is material is that the highway board which was created by that Act of Parliament is expressly restricted in the 21st section to the same limits that the surveyor of highways had been restricted, and the waywardens (who represent the surveyors), collected in the highway board, can do no more within their district than the surveyor could in old times have done within his parish, because it is expressly provided "that no contribution required to be paid by any parish at any one time in pursuance of this Act shall exceed the sum of 10*d.* in the pound, and the aggregate of contributions required to be paid by any parish in any one year in pursuance of this Act, shall not exceed the sum of 2*s.* 6*d.* in the pound," except with certain consents. The 21st section of the Highway Act, 1862, has been repealed by the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 32, but a similar restriction is contained in one of the clauses of s. 33 of the latter Act. The substantial limit remains as it stood upon the earlier statute, the 5 & 6 Wm. 4, c. 50. That, therefore, is the state of the law in respect to places where there is no local board, and where either there is no highway board or where a highway board has been substituted for the surveyor of highways. That is the limit—10*d.* in the pound for a single rate, and 2*s.* 6*d.* in any one year, without certain consents, which I need not discuss now, because it is not argued they have been asked for or obtained. Upon that state of the law the Public Health Act of 1875 (38 & 39 Vict. c. 55), came to operate, and by the 144th section of that Act, "Every urban authority"—and for this purpose the respondents are within the definition of urban authority—"shall within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities, or duties are or may be inconsistent with the provisions of this Act." Now that is the section which

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constitutes the respondents the surveyors of highways for the whole district of Greetland, outer as well as inner. I do not forget the words, that they are to be "subject to all the powers, authorities, duties, and liabilities of surveyors of highways," and so forth, except so far as they are "inconsistent with the provisions of this Act." Then comes the section, upon the true construction of which the whole of this argument really at last turns, —the 216th section of 38 & 39 Vict. c. 55. Now the 216th section and the 217th section deal with the question of highways, and they are headed "Highway Rate." The local board are made surveyors of highways, and their powers in respect of highways and their liabilities and so forth are explained in these two sections. The 216th section enacts that "in any urban district where the expenses under this Act of the urban authority are charged on and defrayed out of the district fund and general district rates, and no other mode of providing for repair of highways is directed by any local Act"—it has not been suggested that there is any local Act applicable to the case—"the cost of repair of highways shall be defrayed as follows (that is to say): (1) Where the whole of the district is rated for works of paving, water supply, and sewerage, or for works for such of these purposes as are provided for in the district, the cost of repairs of highways shall be defrayed out of the general district rate." That is a rate which the urban authority, the local board in this case, being elected by the ratepayers within the ambit of their authority, may make, assess, and collect without any of the limitations and formalities which are enacted as regards highway rates under the old Highway Acts. That sub-section does not apply to this case, because the whole of the district is not rated for works of paving, water supply, and sewerage; only the inner Greetland is rated for such matters. Then comes the 2nd sub-section, which applies to this case: "Where parts of the district are not rated for works of paving, water supply, and sewerage, or for such of these purposes as are provided for in the district, the cost of repair of highways in those parts"—that is, in the parts not rated for works of paving, water supply, and sewerage, which is this case—"shall be defrayed out of a highway rate to be separately assessed and levied in those parts by the urban

authority as surveyor of highways, and the cost of such repair in the residue of the district shall be defrayed out of the general district rate." At first sight that would seem a very reasonable provision. It may be difficult to disintegrate a general district rate and to find out how much of the general district rate is applicable to water, how much to sewerage, and how much to highways. But it may be done, and it is a question simply of difficulty, not at all of impossibility. It must be easy with the necessary amount of trouble to ascertain how much is applied to the purposes of highways over such portion of the district as is generally rated for all purposes. I apprehend, and I assume, that something like a reasonable calculation to that effect has been made in the present case, and it would seem to be reasonable that the portion of the district which is exempt from so much of the general district rate as is applicable to purposes which do not fall within that district, should be liable to the same amount in the pound as their neighbours, who are liable to the whole of the district rate, and this section seems to authorize the urban authority to proceed in the parts of a district where there is nothing to be done except repairing the highways, and to make that which will be a highway rate, because it is applicable to nothing but highways; it is to be separately assessed and levied in those parts because the rest of the district rate is inapplicable to those parts, and it is to be levied by the local board as surveyors of highways under the 144th section. What is there in this 2nd sub-section, or in the words of the 144th section, to shew that the local board, a totally different class of persons, acting under a totally different set of circumstances—acting it is true as surveyors of highways, because in that respect only could they act in that part of the district where there was nothing but highways for which a rate had to be made—were not intended to have the same powers and to act in the same way in the outer part of the district where there is nothing but highways to be repaired, as they are to act in the inner part of the same district where there is more than the highways to be repaired, and where the cost of other works is to be defrayed? They are the same body, they have the same authority, they are to be limited, so far as they are limited, by the same considerations as apply to their general

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authority in the district over which they have their full power. It is urged against this view,—and there is no doubt force in the observation,—that inasmuch as this is a separate part of the district, which is not within the general scope of the operations of the local board, and the inhabitants of which have taken no part in the election of the local board, the local board ought not to have power to assess and rate inhabitants who have not joined in the election of the persons who are to rate them, and it is said that it is an inconvenience, and contrary to principle. I do not say it is not an inconvenience, and I do not say that to a certain extent it is not in violation of the settled rules of taxation. But it must be considered what would be the danger of coming to any other construction. It would be that upon a common subject matter, these highways, within a district to which for the purpose of highways the appellants belong, their liabilities would be limited to the 10*d.* in the pound, and to 2*s.* 6*d.* in the year, whereas the liabilities of all the other inhabitants of the district in respect of the highways might be extended to any sum in the pound which might be necessary to repair them. It is suggested that the object of these provisions in the earlier Acts was to prevent the extravagance of local surveyors and local way-wardens. It may be so for aught I know; but the answer is that the persons placed in the position of surveyors of highways are limited by rules of restriction that would have no application to a local board, and it is to be observed that they are by the 144th section to be surveyors of highways exclusively of any other person, so that if they are not surveyors of highways there are none, and the highways cannot be repaired at all, and these persons, who are a totally different set of people, who are elected by a different kind of constituency, and who are subject to totally different considerations, are to be limited by rules, which may have had excellent reasons in the first instance as regards the persons to whom they were primarily applied, but which would have no reason and no justification when they are applied to a body like a local board. Now, the 3rd sub-section makes, as it seems to me, the matter still plainer. I mean it throws light upon the 2nd. The 2nd is the sub-section that particularly applies to this case, because we have to do with a district part of which has other

works, and part of which has nothing in it but highways; but the 3rd sub-section deals with the case of a district in which there are no works at all except highways, and yet which is within the authority of a local board. The 3rd sub-section says, "Where no public works of paving, water supply, and sewerage are established in the district, the cost of repair of highways in the district shall be defrayed out of a highway rate, to be levied throughout the whole district by the urban authority as surveyor of highways." Now, the argument as it seems to me is irresistible, at least it is very strong, that if what is contended on the part of the appellants is good for a district under the 2nd sub-section, it is almost à fortiori good for a district under the 3rd, and then the authority of these local boards—as I say boards of a totally different character from the waywardens and the surveyors under the Highway Acts—simply by the expression as "surveyor of highways" would be restrained by limits for which there could be no adequate or reasonable ground at all. So I think the matter would stand if the 216th section were alone. It seems to me that in order to sustain the contention of the appellants there ought to be some other words than "as surveyor of highways:" there ought to have been "subject to the limitations," or "provided always that the highway rates shall not exceed the limits imposed by the statutes," whatever the statutes are which impose the limit of 10*d.* in the pound and 2*s.* 6*d.* in the year; but no such words are to be found, and it seems to me upon clear and well established principles that where the plain object and the language of a later statute is according to reasonable construction inconsistent with the language of an earlier statute, the law will say that the later statute is to prevail and repeal the former.

Certain provisions, which appear to me not at all to weaken the argument, are contained in the 217th section. When a highway rate is to be made, the local board need not do any of the following things: they need not have the rate allowed before justices, that limitation is taken off; they need not sign it; they need not lay it before the parishioners assembled in vestry, and they need not verify any accounts kept by them of any such highway rates. Those acts need not be done by the persons who now represent the surveyors of highways on the local boards. From these acts

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the urban authority is by express enactment relieved. When the general construction is, as I have endeavoured to shew, to enlarge the authority of the local board, as far as the extent and amount of rating is concerned, is it any argument in favour of their being limited as to the amount of rating, to say that the local board are exempted from certain definite formal acts which may be necessary in the case of ordinary rates? I confess I do not see any ground why the 217th section is to have that effect. I think that there is nothing, in the absence of definite enlargement of the power in the 217th section, to cut down that which I have endeavoured to shew is the reasonable operation of the 216th section. For these reasons I am of opinion that the judgment of the Queen's Bench Division was correct, and that this appeal must be dismissed.

BRETT, M.R. The respondents are a local board of health, and they are a local board of health in an urban district, and, therefore, they are the urban authority of an urban district. That district is a district called Greetland; it is one district. They are not two urban authorities, they are not two local boards, they are one local board of one district. That is clear. But the district of Greetland is divided into parts. I think that that is the construction of the Act of Parliament, which speaks of one district, and speaks of that district being divided into two parts, and, therefore, that is the case with the present district. Now this local board have repaired the highways in both parts of one district, and they have paid for the repairs in the inner district out of the general district rate, but in order to pay for the repairs in the outer district, they have assessed a highway rate on the inhabitants in the outer district. They have assessed that rate in that outer district in one year to the extent of 3*s.* 4*d.* in the pound, and they have done so without calling a meeting of the inhabitants and without obtaining the consent of four-fifths of the inhabitants, and the question raised in this case is whether that highway rate assessed in the outer district for the repairs of the highways therein is or is not good. The whole question seems to me to depend entirely upon what is the construction of the Public Health Act, 1875, and upon that alone. Now, this local board,

being the urban authority of an urban district, is by s. 144 of the Act of 1875 made the surveyor of highways within that district. This local authority, therefore, is the surveyor of all the highways in the whole district: it is the surveyor of highways in the inner part of that district and also in the outer part of that district. In both cases it is said to "have, exercise, and to be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force." If those words stood alone, I doubt very much whether they would include the right of levying the rate, but even if the word "authorities" does include that, they are to have such authority and to exercise such authority "save so far as such powers, authorities, or duties are or may be inconsistent with the provisions of this Act." Now, what are the provisions of this Act with regard to the assessment of rates? The provisions of this Act with regard to the assessment of rates are to be found in s. 216. In s. 144 there is a reference no doubt to a former legislation with regard to the highways, because they are to "exercise all the powers, authorities, and duties of surveyors of highways under the law for the time being in force." But it will remain to be seen whether there is any reference in s. 216 to any statute besides the Public Health Act, 1875, itself. The provisions as to the mode of paying for the repairs of highways are stated in s. 216. If the whole district is under one condition, that is, the condition provided for in the 1st sub-section, "the cost of repair of highways shall be defrayed out of the general district rate." In such a district as that the local board, the urban authority, have to exercise all the authorities and to perform all the duties, and to be subject to all the liabilities of ordinary surveyors of highways; but when they have to pay for what they have done, they are no longer to perform that part of the duty in the way that surveyors of highways did; on the contrary, they are to do it in a totally different way: "the cost of repair of highways shall be defrayed out of the general district rate." Therefore that part of s. 144 is obviously repealed, which says that the urban authority are to act subject to the liabilities of surveyors of highways. It is obviously inconsistent with that part, and the 144th section has nothing to do with a

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district in that condition so far as the payment of the expenses of repairs is concerned. Therefore if the condition of the district is that which is described in the 1st sub-section, it seems difficult to me to say that the work is to be paid for in the same way, or is to be performed in the same way, as surveyors of highways did pay for and perform it. To my mind it would lead to an absurdity. It comes to this: the local board is elected, as it is said, by the inhabitants; it is a board of great authority; it has much more to do than merely to be surveyor of highways. With regard to all the other things, much more important than and going to a far greater extent than the cost of repairing the highways, there is no such limitation of their authority as is suggested. Their duties they have to perform subject only to this, that when they offer themselves for re-election by the inhabitants, their conduct may be inquired into, but whilst they are the local authority the inhabitants have no power over them. But it is suggested that, although in much more important things the inhabitants have no power over them, yet in respect of the highways, if the repairs are over 2*s.* 6*d.* in the year, they are to have authority over them. It seems to me impossible that the legislature can have meant that. Now I come to sub-s. 2: "Where parts of the district are not rated for works of paving, water supply, and sewerage, or for such of these purposes as are provided for in the district, the cost of repair of highways in those parts shall be defrayed out of a highway rate, to be separately assessed and levied in those parts by the urban authority as surveyor of highways." Now, unless those words, "as surveyor of highways," bring in the limitations of the Highway Acts, it seems to me no limitation is imposed. The question seems to me to be whether those words "as surveyor of highways," are to refer to the former Acts with regard to highway surveyors, or are only a reference to a part of this Act. The urban authority has many characters within the Public Health Act, 1875; it is the sanitary authority, it is the authority in many other matters; but by s. 144, in addition to its other characters, it has imposed upon it the character of surveyor of highways, and it seems to me that those words "as surveyor of highways" are only a reference to that part of their character imposed upon them within

this Act, and that, therefore, it is a reference to something within this Act, and is not a reference to anything outside this Act, and if that be true, it has not the force and power for which it has been cited. It does not bring in the limitations of the Highway Acts as to the powers of surveyors. I confess that I am very much led to that opinion by seeing what would be the consequence of reading the Public Health Act, 1875, otherwise. I admit that in the inner district a highway rate is not assessed, but a general district rate is assessed. It must be obvious to anybody who understands business that the amount of that general district rate must depend partly upon the estimate of what the repairs of the highways will be. In making out their estimate for the district rate the local board must have an item in it referring to the highway rate. Inasmuch as there is no limitation of their power with regard to the general district rate (such as is suggested with regard to the highway rate), so far as it deals with the highway rate in that part of the district for which they are urban authority, they might make an estimate, and act upon it, which would be more than 3*s.* 4*d.* in the year, and therefore more than 2*s.* 6*d.* in the year, or more than 10*d.* in the pound for one rate. Therefore, in that part of the district, although it is not in terms a highway rate, there is substantially that which is equivalent to a highway rate comprised in the district rate, and with regard to which there is no limitation. Yet it is said that in the same district, but in another part of it, they are there to be subject to this limitation of a vote by the inhabitants, which would come to this—that upon the highways in one part of the same district they could do repairs to the extent of 3*s.* 4*d.* or more in the year without any interposition of those inhabitants, but in the other part they could not repair the highways to an extent greater than 2*s.* 6*d.* in the year unless they had the authority of the inhabitants. It seems to me that would be a most strange species of legislation. It seems to me further, that the reasons for imposing that limitation upon the class of persons who in rural districts are the surveyors of highways, do not apply to the persons who are the local authority, who have large powers as to making district rates. who are persons of a totally different class from the former surveyors; and it

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seems to me that there is good reason why the legislature should not have imposed the same restriction upon them as it did upon the surveyors. It seems to me that that is carried out by the enactment, and that the right and proper manner to read this enactment is to say that those words "as surveyors of highways" do not refer to the Highway Acts, but only refer to that part of the Public Health Act, 1875, which has constituted that local board within and by this Act the surveyor of highways. I therefore agree with the judgment of the Queen's Bench Division, and I think this appeal fails.

LORD COLERIDGE, C.J. I am desired by Bowen, L.J., who was present during the argument, to say that he concurs in our judgment.

Judgment for the respondents. (1)

Solicitors for appellants: *Emmet, Son, & Stubbs, for Wavell, Son, & Marshall, Halifax.*

Solicitors for respondents: *Bower, Cotton, & Bower, for J. W. Longbottom, Halifax.*

(1) The Court of Appeal refused leave to appeal from their judgment to the House of Lords, if upon the true construction of the Public Health Act, 1875, and of the Supreme Court of Judicature Acts, 1873, 1875, and the Appellate Jurisdiction Act, 1876, such leave was necessary.

J. E. H.

[IN THE COURT OF APPEAL.]

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THE QUEEN *v.* THE JUDGE OF THE COUNTY COURT OF SURREY.

Bankruptcy—County Court—Jurisdiction—Contempt of Court—Committal—Prohibition—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 66, 96.

The Bankruptcy Act, 1869, s. 66, which conferred upon the judge of a county court sitting in bankruptcy all the powers and jurisdiction of a judge of the Court of Chancery, thereby gave to him the power to commit for a contempt of court; and therefore a person who disobeyed a summons issued under s. 96 of that statute to attend and give evidence as to the bankrupt's estate and to produce documents in his control relating thereto, might be attached for contempt; and the power of commitment was not taken away by the fact that the latter section also conferred a power on the judge of the county court to order by warrant the person who had disobeyed the summons to be apprehended and brought up for examination, this latter remedy being only cumulative.

THE following facts appeared in the affidavits sworn in the course of the proceedings resulting in the present appeal. A. and F. Lycett, who had carried on business as bakers and confectioners in partnership, were, in 1882, adjudged bankrupts in the County Court of Surrey, holden at Croydon, and F. Ashby was appointed trustee. In November, 1883, A. W. Gibbons, who was a solicitor and had acted for the bankrupts, was served with a subpœna duces tecum to attend in the bankruptcy at the registrar's office at Croydon County Court, on the 14th of December, at 2.30 P.M. to produce his costs and accounts with the bankrupts, and to be examined thereon. A. W. Gibbons did not arrive at the registrar's office until long after the time fixed and until after the examination had been adjourned. An application for the committal of A. W. Gibbons was made to the county court at Croydon, and at the hearing thereof he undertook to attend a further appointment for his examination, and to pay the costs of the abortive appointment and of that application. He accordingly did attend two appointments and was examined, but he did not pay the costs on the ground that the costs charged greatly exceeded what he had anticipated; and ultimately, on the 18th of April, 1884, the deputy judge made an order that A.W. Gibbons

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should be committed for contempt, but that the warrant should not issue if the costs should be paid within seven days after taxation. A. W. Gibbons then obtained, in the Queen's Bench Division, a rule for a prohibition to the judge of the county court at Croydon, which was, after argument, discharged. A. W. Gibbons then appealed to this Court.

The affidavit sworn in opposition to the rule was made by three persons, and contained grave charges of bad faith and misconduct on the part of A. W. Gibbons, which he in two affidavits made by him denied or endeavoured to explain away. It is, however, unnecessary to state the contents of the affidavits, as the judges of the Court of Appeal held that the only question before them was as to the jurisdiction of the county court.

May 22, 23. *Arthur Charles, Q.C.*, and *Lynch*, for A. W. Gibbons. The judge of a county court, when he is exercising a jurisdiction at common law, can punish only for contempts committed in the face of the court: his power does not extend to contempts committed out of court: *Reg.* v. *Lefroy*. (1) And in 4 Blackstone's Commentaries, ch. 20, pp. 280, 282, 283, 284, 285, the jurisdiction to punish for contempts appears to be considered to belong only to superior courts. It is not, however, denied on behalf of A. W. Gibbons that the judge of a county court sitting in bankruptcy under the Bankruptcy Act, 1869 (2), has a limited power to punish for contempt; but that power is confined to those

(1) Law Rep. 8 Q. B. 134.

(2) By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 59, "If the person sought to be adjudged a bankrupt, being resident in England, do not reside or carry on business within the London Bankruptcy District, then 'the Court' shall, subject to the provisions hereinafter contained for removing the proceedings, mean the county court of the district in which such person resides or carries on business, hereinafter referred to as the local Bankruptcy Court."

By s. 66, "Every judge of a local court of bankruptcy shall, for the purposes of this Act, in addition to his ordinary powers as a county court judge, have all the powers and jurisdiction of a judge of Her Majesty's High Court of Chancery, and the orders of such judge may be enforced accordingly in manner prescribed."

By s. 71 an appeal from a local bankruptcy court was given to the Chief Judge in Bankruptcy, and from him to the Court of Appeal in Chancery, and by leave from that court to the House of Lords.

Sect. 96, "The court may, on the application of the trustee, at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt or his wife, or any person whatever known or suspected to have in his possession any

instances where it is expressly created by statute, or at least statutory authority; thus disobedience to orders of the court in certain cases is expressly declared to be a contempt of court: Bankruptcy Act, 1869, ss. 19, 28, 93, 126; and it is to these instances, and to them alone, that the Bankruptcy Rules, 1870, Nos. 178, 179, apply, which provide the machinery necessary for punishing contempts. For the trustee it may be contended that the order for committal was valid, because the Bankruptcy Act 1869, s. 66, confers upon "every judge of a local court of bankruptcy . . . . all the powers and jurisdiction of a judge of Her Majesty's High Court of Chancery." But the practice in the Court of Chancery was, that if a person served with a subpœna did not obey it, an order of the Court was obtained to compel him to attend; and then, but not otherwise, he could be attached for his disobedience: 1 Daniell's Chancery Practice, 5th ed., ch. xxii., s. 11, pp. 803, 804. In the present case no order of the county court was obtained that Gibbons should attend for examination; only a summons was issued, and no order for his attendance having been obtained from the county court, no contempt has been committed by him. It would have been rather dangerous to entrust the judge of an inferior court like a county court with

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of the estate or effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the Court may deem capable of giving information respecting the bankrupt, his trade dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the bankrupt, his dealings or property; and if any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce such documents, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant addressed as aforesaid, cause such person to be apprehended and brought up for examination."

The Bankruptcy Act, 1869, is repealed by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 169, and sch. 5; but s. 27, sub-s. 1, 2 of the latter statute contains provisions substantially identical with those of the Bankruptcy Act, 1869, s. 96. By s. 100 of the Bankruptcy Act, 1883, "a county court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the court, have all the powers and jurisdiction of the High Court." By the Bankruptcy Appeals (County Courts) Act, 1884 (47 Vict. c. 9), s. 2, an appeal lies from the order of a county court sitting in bankruptcy to a Divisional Court of the High Court of Justice, and from that court by special leave to the Court of Appeal.

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all the powers of the judges of the superior courts of law and equity: otherwise it is hard to understand why the Chief Judge in Bankruptcy should have all the powers, jurisdiction, and privileges of a judge of either a superior court of law or of the Court of Chancery (s. 65), whereas the judge of a local court of bankruptcy has only all the powers and jurisdiction of a judge of the Court of Chancery (s. 66).

But, further, a full and sufficient remedy is given by s. 96: if a person duly summoned under its provisions fails to attend, he may be apprehended upon the warrant of the court, and may be brought up for examination. This procedure is all that is requisite for the due realisation of the bankrupt's assets: it is a remedy expressly given by statute, and no other can be implied. The same remark may be made as to the analogous provisions in the Companies Act, 1862, s. 115. It was said by Pollock, B., in *Ex parte Martin* (1) that "where the liberty of the subject is affected, the language must be very clear and explicit to justify imprisonment:" in the present case it is at least very doubtful whether the legislature intended that the remedy by attachment should exist.

J. Horne Payne, for Ashby, the trustee in bankruptcy. By the Bankruptcy Act, 1869, s. 72, every Court administering bankruptcy is not to be restrained by any other Court in the execution of its powers. The proper course for Gibbons to take in order to get rid of the order was to appeal under s. 71, as was done in *Ex parte Ferrige, In re Ferrige.* (2)

[BRETT, M.R. In that case, so far as appears, the order for commitment was regularly made.]

Gibbons was summoned under the Bankruptcy Act, 1869, s. 96, to give evidence and to produce documents; he disobeyed the summons or "subpœna," as it is termed in the Bankruptcy Rules, 1870, rr. 166, 167, 168, and by this act of disobedience he was guilty of a contempt of court. Certain acts and omissions are declared to be contempts of court by the Bankruptcy Act, 1869, ss. 19, 28, 55, 56, 70, 93, 126; and the power to arrest and imprison of a court of bankruptcy is also recognised by the Debtors' Act, 1869 (32 & 33 Vict. c. 62), s. 9. It is true that when the

(1) 4 Q. B. D. 212, at p. 215. (2) Law Rep. 20 Eq. 289.

judge of a county court is sitting at common law, he can inflict only a fine of 10*l.* for disobedience to a subpœna: County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 86; and he can inflict only a fine of 5*l.* for a contempt committed in the face of the court: County Courts Act, 1846, s. 113. But the jurisdiction of a county court judge, when he sits in bankruptcy, is much greater than when he sits either at common law or in equity under the County Courts Act, 1865 (28 & 29 Vict. c. 99). In fact, when he sits in bankruptcy, he is clothed with the jurisdiction and powers of a judge of a superior court. The Bankruptcy Act, 1869, s. 66, expressly confers upon him the position of a judge of the Court of Chancery.

[BOWEN, L.J. The procedure under the Bankruptcy Act, 1869, s. 96, is almost identical with that under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 115; the proper mode of proceeding under the latter enactment was much discussed in the case, *In re English Joint Stock Bank.* (1)]

Apart from the provisions of the Companies Act, 1862, s. 115, no mode of enforcing obedience to a summons or a subpœna to attend as a witness upon the winding-up of a company appears to exist beyond the ordinary powers of proceeding for contempt. It follows from *In re Gold Company* (2) and *In re Silkstone and Dodworth Coal and Iron Company, Whitworth's Case* (3), that whenever the jurisdiction to summon a person as witness exists, he has no power to object to be examined.

Lynch, in reply. The remedy contained in the Bankruptcy Act, 1869, s. 96, for disobedience to a summons issued pursuant to that enactment, is very wide, as is plain from *Wright* v. *Maude* (4): that was a decision upon a similar provision in 6 Geo. 4, c. 16, s. 33; and it shews that a person subpœnaed upon any default may be arrested by warrant and compelled to give evidence.

Cur. adv. vult.

May 30. The following judgments were delivered:—

BRETT, M.R. The appellant, A. W. Gibbons, was served with a subpœna issued out of a county court to produce documents and

(1) Law Rep. 3 Eq. 203.
(2) 12 Ch. D. 77.
(3) 19 Ch. D. 118.
(4) 10 M. & W. 527.

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to give evidence in the course of certain proceedings in bankruptcy. He was alleged to have made default in obeying the subpœna, and therefore the deputy-judge was induced to order an attachment to be issued. The order for the attachment was the same as a direction that Gibbons should be taken into custody. A rule for a prohibition was obtained in the Queen's Bench Division; but after argument it was discharged. The question raised upon the present appeal is of importance. If the judge of a county court has the jurisdiction claimed, no doubt the writ of prohibition must be refused; but it is necessary to look carefully whether the power of commitment as for a contempt existed in the present case. The solution of the matter depends upon the Bankruptcy Act, 1869. What authority does that statute confer upon the judge of a local court of bankruptcy? By s. 66 he is to have the ordinary powers of a county court judge; and therefore when he sits in bankruptcy, he sits as the judge of a court of record. It follows that he is invested with certain powers, amongst them the power to commit for contempt of court; but it seems to me that as judge of a county court he cannot commit for a contempt, unless the contempt be committed in the face of the court; and if this were his only authority, he would not have power to commit in the present case. It has been urged in effect that the judge of a county court sitting in bankruptcy is to be deemed to be a judge of a superior court. I cannot accede to that argument, at least to its full extent. The London Court of Bankruptcy is a superior court of law and equity, and a principal court of record: Bankruptcy Act, 1869, s. 65; and certainly the Court of Chancery was a superior court, and by the mere fact of that incident a judge of the Court of Chancery had power to commit for contempt. The Court of Chancery had great powers of commitment, and also of attachment for not obeying its process or orders. Attachment was a mode of enforcing the decrees of the court. The judge of a county court has none of these powers. I find it difficult to suppose that the legislature could have really given an unlimited power of attachment to the judge of a county court. I confess that it seems to me rather strange that the judge of a court in the country, where he is not exposed to the criticism of other judges and of the bar of

England, should have a jurisdiction of that kind conferred upon him. But the question is whether the jurisdiction has been conferred in the present case. I must take it that Gibbons has refused to obey a summons lawfully issued under the Bankruptcy Act, 1869, s. 96, and has refused to submit himself to examination, and to produce any documents which may be in his control. It was to be expected that some remedy would be given for disobedience of this kind, and a remedy is given by that section itself. It seems to me that everything necessary for the proper disclosure of a bankrupt's affairs is contained in that section. Upon his default Gibbons might have been apprehended upon a warrant, and might have been brought up in custody, and if he had refused to answer the questions put to him, he might have been sent to prison. That remedy appears to me sufficient. But reliance is placed upon s. 66 of the Bankruptcy Act, 1869, and if the legislature has given the power contended for, it must be put in force. Whether the effect of that section was fully contemplated by the legislature, I do not know. Sect. 66 gives every judge of a local court of bankruptcy (that is, every judge of a county court), "all the powers and jurisdiction of a judge" of the High Court of Chancery. This legislative provision invests a judge of a county court with extraordinary power; either he may by warrant compel a disobedient person to attend in order to be examined under the provisions of s. 96, or he may punish him for contempt under s. 66. This is a somewhat strange, and certainly it is a large jurisdiction. I was under the impression that s. 66 might be construed merely as conferring "all the powers and jurisdiction" of a judge of the Court of Chancery for the purposes expressly mentioned in the Act, and for no other purpose. In that view the judge of a county court sitting in bankruptcy would have had the power to commit for contempt of himself personally, and for any contempt expressly created by the statute. I think, however, upon reflection that this is not the proper manner of interpreting the section. If the words of it are read in their ordinary sense, it confers upon a judge of a county court the same power as a judge of the High Court of Chancery in respect of acts done or omitted to be done. If there had been no appeal, I should have thought it impossible that the legislature could have intended to create so extensive a jurisdiction; but an appeal would lie, and

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therefore, as it seems to me, the judge of the county court had power to issue an attachment. The only question before us is whether a prohibition ought to be granted. We have not to decide whether the judge rightly exercised his jurisdiction; but I do not suggest that he exercised it wrongly. The appeal, which has been brought before us, fails.

BOWEN, L.J. I agree with the conclusion that this appeal must be dismissed. The sole question before us is as to the jurisdiction of the county court to punish for disobedience to a summons to attend and give evidence, and to produce documents. The power to commit for a failure to obey a summons depends upon the Bankruptcy Act, 1869, ss. 65, 66. The London Court of Bankruptcy was made by s. 65 a superior court of law and equity and also a court of record. The language of s. 66 is different. The judge of the county court is to have the powers of a judge of the High Court of Chancery for the purposes of the Act: therefore he is not clothed with the same powers as the judge of the London Bankruptcy Court. Nevertheless, the powers of a judge of the Court of Chancery were high and sweeping, and he could punish by attachment disobedience to his orders made in the course of a suit. I find it impossible in the face of the words of s. 66 to hold that the judge of a county court has not power to enforce in a like way an order made under s. 96. Sect. 96 of the Bankruptcy Act, 1869, is almost identical with the Companies Act, 1862, s. 115. Is a summons of that kind enforceable by attachment? I think that it is: it is not like a summons at chambers or a summons to appear and shew cause; if the person summoned under s. 96 does not appear, the case cannot go on equally well without him: the summons is at least as much the process of the court as a subpœna issued to a witness in an action in the High Court: it may be another form of process, but it is of a like kind; and disobedience to it ought to be equally punished by attachment. But it has been urged that a perfect remedy has been expressly provided by s. 96 itself, and that no other ought to be implied; but is the remedy pointed out in s. 96 an apt and complete remedy? It seems to me that it is only cumulative. It is not so complete as to dispense with every other remedy. If the person summoned does not attend at the

time ordered, it may be afterwards too late to examine him with equal effect; and there may be no compensation for the mischief occasioned by the delay. The failure to attend may be accompanied by such circumstances as to amount to an offence against the administration of justice. The power of commitment for non-obedience to such a summons may thus be necessary to the administration of free and speedy justice; and whenever this is the case in bankruptcy, the power becomes a power required for the purposes of the Bankruptcy Act. Under a similar section in the Companies Act, 1862, s. 115, contempts may be punished by the Court of Chancery by attachment, and I see no reason why the local courts of bankruptcy have not under the Bankruptcy Act, 1869, s. 96, a similar jurisdiction for enforcing similar orders.

FRY, L.J. I am of the same opinion. An order to attend was made upon the appellant under s. 96 of the Bankruptcy Act, 1869. I say "an order," because although the word used in the section is "summons," the summons is in effect an order by the Court to attend. Such an order differs from a summons taken out by one party requiring the other party to attend, under which, if he does not attend, the case may proceed in his absence. An order under s. 96 is made by the Court after judicial consideration of the necessity for making it, and is of a more solemn character than a subpœna, which is often issued without such consideration. Sect. 66 of the same Act gave to the county court judge sitting in bankruptcy, in addition to his ordinary powers as a county court judge, all the powers and jurisdiction of a judge of the Court of Chancery, and the orders of such judge are to be enforced "in manner prescribed." These latter words undoubtedly referred to rules to be made under the Act, but no such rules have been made prescribing the manner in which the orders of the judge are to be enforced. The question therefore is, had the High Court of Chancery power, when the Act of 1869 came into operation, to commit a person who declined or refused to obey an order similar to that which has been made under s. 96? It has been pointed out that at that time s. 115 of the Companies Act, 1862, which is practically identical with s. 96, was in force. The question therefore is, whether the Court of Chancery had power in 1869 to commit a

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person to prison for disobedience to an order made under s. 115 of the Act of 1862. I have no doubt that the Court had such a power. It was, however, suggested that s. 115 of the Act of 1862, like s. 96 of the Act of 1869, gave a particular power to arrest and bring before the Court a person who had disobeyed the order; but for the reasons given by Bowen, L.J., it seems to me that the power did not exclude the power to commit for disobedience to the order. It was an additional power, and was not intended to take from the Court the general power which it had to enforce an order for contempt. I am confirmed in that conclusion by the observation that undoubtedly the Courts of common law had jurisdiction to commit for disobedience to a subpœna issued by a party; and if that be so, the Court of Chancery had the same power to commit for disobedience to an order made by the Court after consideration as to the necessity for the attendance of a particular witness. While the county court judge was sitting in bankruptcy it seems to me that he was sitting for the purposes of the Act; and the power to commit for contempt when sitting in that character, is given for the purpose, not of vindicating the personal dignity of the judge, but of carrying into effect without undue delay the duties cast upon him by the Act. I am confirmed in this conclusion as to the effect of s. 66 by the other provisions of the Act of 1869. By ss. 19, 28, 56, 77, 93 and 126 of that Act, it is declared that certain acts are to be deemed to be contempts of court, and are to be punished accordingly; but the Act is silent as to the mode of punishment, unless it is to be found in s. 66. I conclude that the legislature intended to give the power to punish for contempt by committal, and that this appeal must therefore be dismissed.

Appeal dismissed.

Solicitor for A. W. Gibbons: *Charles Barfield.*

Solicitors for F. Ashby, trustee in bankruptcy: *Wynne-Baxter, Rance & Mead, for John S. Streeter, Croydon.*

J. E. H.

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2. —— *Act of Bankruptcy—Relation back of Trustee's Title—Bankruptcy Petition—Money received by petitioning Creditor's Solicitor from Debtor during Pendency of Petition, and paid over to petitioning Creditor—Liability of Solicitor to refund to Trustee—Principal and Agent.*] Pending the hearing of a bankruptcy petition, and with notice of the act of bankruptcy on which it was founded, the solicitor of the petitioning creditor

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as his agent, received from the debtor various sums of money as consideration for successive adjournments of the hearing of the petition, and these sums he paid over, or accounted for, to his client (the petitioning creditor). Afterwards an adjudication was made on the petition:—*Held*, that, the solicitor having received the money with notice of the act of bankruptcy to which the title of the trustee related back, the payment by him was a wrongful act, and he was liable to repay the money to the trustee, and was not discharged by the payment to his own principal. Ex parte Edwards. In re Chapman - - **C. A. 747**

3. —— *Act of Bankruptcy—Notice of Suspension of Payment—Verbal Declaration of Inability to pay Debts—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-ss.* 1 (*f*), 1 (*h*).] An oral statement made by a debtor to a creditor that he is unable to pay his debts in full, is not a notice that he has suspended, or is about to suspend, payment of his debts, so as to constitute an act of bankruptcy within sub-s. 1 (*h*) of s. 4 of the Bankruptcy Act, 1883.—Such a notice may be given orally, but it must be given formally and deliberately, and with the intention of giving notice. Ex parte Oastler. In re Friedlander **[C. A. 471**

4. —— *Act of Bankruptcy—Notice of Suspension of Payment—Verbal Notice—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*)—*Bankruptcy Rules*, 1883, *rule* 11.] A notice by a debtor that he has suspended, or that he is about to suspend, payment of his debts need not, in order that it may constitute an act of bankruptcy, be in writing. It is sufficient if a verbal statement to that effect be made by the debtor to one of his creditors. Ex parte Nickoll. In re Walker - - - - - **469**

5. —— *Administration in Bankruptcy of Insolvent Estate—Transfer of Administration Proceedings from High Court to County Court—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-ss.* 1, 3, 3, 4, 5—*Bankruptcy Forms*, 1883, *Nos.* 11, 31, 32.] When proceedings for the administration of a deceased debtor's estate have been commenced in the Chancery Division of the High Court, and an order has been made, under sub-s. 4 of s. 125 of the Bankruptcy Act, 1883, for the transfer of the proceedings to the Court exercising jurisdiction in bankruptcy, that Court may make an administration order on an ex parte application by a creditor, but the order cannot be made until the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the legal personal representative, or unless it is proved that the debtor committed an act of bankruptcy within three months prior to his decease. Ex parte May. In re May - - - - - - **552**

6. —— *Bill of Exchange drawn against Goods—Specific Appropriation of Consignments—Insolvency of Acceptor—Rights of Bill-holder and Drawer—Interest credited by Acceptor to Drawer.*] Bankers in London, at the request of M., who was acting as the agent in London of S., a merchant at Shanghai, on the 16th of March, 1883, granted to S. a letter of credit for 20,000*l.* The letter authorized S. "to draw on us four

BANKRUPTCY—*continued.*

months' sight for any sums not exceeding 20,000*l.*, such draft or drafts to be accompanied by bills of lading and invoices of tea, purchased according to order of M., and shipped by steamers to London, and marine insurance policies relating thereto, and these documents to be surrendered to us against our acceptances. And we hereby agree with you, and also as a separate engagement with the bonâ fide holders respectively of the bills drawn in compliance with the terms of this credit, that the same shall be duly accepted on presentation and paid at maturity, if drawn and negotiated on or before the 31st of December, 1883." It was agreed that a commission of 1 per cent. should be paid to the bankers on all drafts drawn under the credit, and M. agreed that he would meet all the acceptances on or before their due dates, "the usual rate of 2½ per cent. being allowed on all prepayments." Bills were drawn by S. under this credit against various parcels of tea consigned by him to M. for sale. In each case the bill mentioned the parcel of tea against which it was drawn, and purported to be drawn under the letter of credit, the date of which was mentioned, and the bills of lading and other shipping documents were in each case attached to the bill. S., in each case, advised the bankers of the drawing of the bill, mentioning the tea against which it was drawn and the name of the vessel by which it was shipped. S. discounted the bills with a Chinese bank, and their agent in London presented the bills for acceptance, and in exchange for the acceptance delivered the bills of lading and other documents attached to the London bankers, in whose name the tea was then warehoused with a dock company. As M. from time to time required portions of the tea for delivery to purchasers, the bankers handed to him warrants or delivery orders, he paying them the value of the tea comprised therein. The moneys thus received were paid to the credit of the general current account of the bankers with their own bankers. In an account in their books with M., they debited him with the amounts of the acceptances and credited him with the amounts received by the sales and with 2½ per cent. according to the agreement.—The London bankers suspended payment and filed a liquidation petition before their acceptances matured:—*Held*, that, having regard to the terms of the letter of credit, the bill-holders could not claim any specific appropriation of the teas to meet the acceptances:—But, *held*, that S. was entitled to have the teas which remained in specie at the date of the suspension (but not the proceeds of the sale of the teas which were sold before the suspension) applied in payment of the acceptances. *—Frith* v. *Forbes* (4 D. F. & J. 409) distinguished. Ex parte Dever. In re Suse - **C. A. 766**

7. —— *Bill of Exchange — Acceptances for Accommodation of Drawer—Remittances to cover Acceptances — Insolvency of Acceptor — Specific Appropriation—Interest credited by Acceptor to Drawer.*] A banker in London was in the habit of accepting for the accommodation of a customer, a merchant in Sweden, bills drawn on him by the merchant, who used to remit other bills to the banker to put him in funds to meet the acceptances when they became due. The banker, with

BANKRUPTCY—*continued.*

the knowledge of the customer, generally discounted the remitted bills before they fell due, and paid the proceeds to his current account with his own bankers. He rendered yearly accounts to the customer, and in those accounts he credited him with interest on the amounts of the remitted bills from their due dates, and debited him with interest on the amounts which he paid in discharge of the acceptances. The amounts of the bills remitted by the customer did not always exactly correspond with the amounts of the acceptances which they were intended to cover. In April, 1883, the banker accepted a bill for 450*l.* drawn on him by the customer, and maturing on the 21st of July. On the 13th of July the customer sent to the banker a bill for 450*l.* upon W., of London, payable at sight. This bill was received by the banker on the 17th of July, and the proceeds were paid to his bankers and carried to his current account. On the 20th of July the banker stopped payment. His acceptance for 450*l.* was dishonoured the next day, and the customer had to pay it. In November, 1883, the banker filed a liquidation petition:—*Held*, that the remitted bill for 450*l.* was not specifically appropriated to meet the banker's acceptance for 450*l.*, and that, as the amount of the bill had been received by the banker before the commencement of the liquidation, the customer was not entitled to the proceeds in specie, but could only prove for the amount as a debt in the liquidation.—*Semble*, that, if the remitted bill had remained in specie at the commencement of the liquidation, the customer would, on retiring the acceptance, have been entitled to have the bill returned to him.—*In re Gothenburg Commercial Co.* (29 W. R. 358) approved and followed. IN RE BROAD. EX PARTE NECK C. A. 740

8. —— *County Court — Jurisdiction — Contempt of Court—Committal—Prohibition—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 66, 96.] The Bankruptcy Act, 1869, s. 66, which conferred upon the judge of a county court sitting in bankruptcy all the powers and jurisdiction of a judge of the Court of Chancery, thereby gave to him the power to commit for a contempt of court; and therefore a person who disobeyed a summons issued under s. 96 of that statute to attend and give evidence as to the bankrupt's estate and to produce documents in his control relating thereto, might be attached for contempt; and the power of commitment was not taken away by the fact that the latter section also conferred a power on the judge of the county court to order by warrant the person who had disobeyed the summons to be apprehended and brought up for examination, this latter remedy being only cumulative. THE QUEEN *v.* JUDGE OF CROYDON COUNTY COURT - - C. A. 963

9. —— *Appeal—Preliminary Objection—Costs—Practice.*] When the respondent to an appeal intends to take a preliminary objection he should give notice to the appellant of his intention so to do. If no such notice is given and the objection prevails, the appeal will be dismissed without costs. IN RE SPEIGHT - - - 42

10. —— *Costs—Taxation—Petitioner's Costs of Bankruptcy Petition—Costs incidental to second Meeting of Creditors—"Proceeding in Court"—Jurisdiction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 105, *sub-s.* 1—*Bankruptcy Rules*, 1883, *rr.* 100, 105.] The second meeting of creditors under a bankruptcy petition (held to consider the confirmation of a scheme of arrangement of the debtor's affairs accepted at the first meeting) is not a "proceeding in court" within the meaning of sub-s. 1 of s. 105 of the Bankruptcy Act, 1883, and the Court has no power to order the costs of the petitioner incidental to that meeting to be paid out of the debtor's estate.—But the Court has power to order the petitioner's costs incidental to the public examination of the debtor to be paid out of the estate. EX PARTE THE BOARD OF TRADE. IN RE STRAND - - - 492

11. —— *Order of Commitment — Judgment Summons — Judgment under* 50*l.*—*Appeal from Judge of High Court—Court of Appeal—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 103, 104—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.] Under the Bankruptcy Act, 1883, s. 103—which enables the jurisdiction under s. 5 of the Debtors Act, 1869, to be delegated to and exercised by the bankruptcy registrars of the High Court, and s. 104, by which in bankruptcy matters, an appeal lies from the order of the High Court to the Court of Appeal—an appeal from an order of the judge having jurisdiction in bankruptcy respecting the commitment of a judgment debtor must be made to the Court of Appeal and not to the Divisional Court. GENESE *v.* LASCELLES - - 901

12. —— *Landlord and Tenant—Preferential Debt—Rent—Distress—Landlord—Money due to Gas Company for Gas supplied — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 34.] By their special Act (39 & 40 Vict. c. CXIX., s. 44) the corporation of Walsall were empowered to "recover from any person any rent or charge due to them by him for gas supplied, by the like means as landlords are for the time being by law allowed to recover rent in arrear":—*Held*, that, after the filing of a liquidation petition by a customer, the corporation were entitled as against the trustee in the liquidation to levy a distress in respect of a sum due by the debtor for gas supplied to him before the filing of the petition:—*Held*, also, that the corporation were not, within the meaning of s. 34 of of the Bankruptcy Act, 1869, "other persons" to whom any rent was due by the debtor, but that, by virtue of s. 44 of the special Act, they were entitled to the rights given to landlords by s. 34.—The payment due to a gas company for gas supplied, though it is called "rent" in some Acts of Parliament, is not really of the nature of rent, and consequently a gas company does not come within the words "other person to whom any rent is due" in s. 34 of the Bankruptcy Act, 1869. Those words apply only to a person who, though he is not the landlord of the bankrupt, fills a position analogous to that of a landlord, because he is entitled to receive that which is "rent" strictly so called. —Decision of Cave, J., affirmed, but on a different ground.—*Ex parte Birmingham Gas Light Co.* (Law Rep. 11 Eq. 615) and *Ex parte Hill* (6 Ch. D. 63) commented on. EX PARTE HARRISON. IN RE PEAKE - - - - C. A. 753

13. —— *Disclaimer of Leasehold Interest—Use*

and Occupation—Bankruptcy Act, 1869, *s.* 23—*Rule* 28 *of the Bankruptcy Rules*, 1871.] W., who occupied premises as a yearly tenant, was adjudicated bankrupt on the 7th of September, 1883. The defendant, as trustee, entered into possession of the premises and held them until the 29th of January, 1884 (when he tendered the keys to the plaintiff, the landlord), for the purpose of winding up the bankrupt's business and realizing his assets for the benefit of the estate,—paying rent down to the 25th of December, 1883.—On the 26th of February, 1884, the trustee with the leave of the Court, and after notice to the landlord, disclaimed all interest in the term:—*Held*, that the disclaimer relating back by force of s. 23 of the Bankruptcy Act, 1869, to the date of the adjudication, the trustee was not liable to an action in respect of his subsequent occupation of the premises (either as assignee or as a trespasser); the landlord's only remedy being by application to the Court of Bankruptcy under rule 28 of the Bankruptcy Rules, 1871. GABRIEL *v.* BLANKENSTEIN - **684**

14. —— *Leaseholds—Fixtures—Disclaimer—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55.] Where there are trade fixtures on the leasehold premises of a bankrupt, removable by the tenant, and the trustee applies for leave to disclaim the lease, the same rule will be applied as between the landlord and trustee as would obtain if the lease had been determined in an ordinary way. Therefore the landlord must either take over the fixtures at a valuation or the trustee must have a reasonable time, before disclaiming, in which to sever and remove them. IN RE MOSER - **738**

15. —— *Leaseholds—Disclaimer by Trustee—Extension of Time—Bankruptcy Act*, 1883, *ss.* 55, 105, *sub-s.* 4—*Practice.*] Although the three months given to a trustee by s. 55, sub-s. 1, within which to disclaim onerous property, may have expired, the Court has power under s. 105, sub-s. 4, to grant the trustee an extension of time.—When a trustee applies for an extension of time, he should give some good reason for the indulgence he asks, and if the rights of other parties will be prejudiced by the time being extended, the Court will, as a general rule, put the trustee upon terms. IN RE PRICE. EX PARTE FOREMAN **466**

16. —— *Landlord and Tenant—Forfeiture on Tenant "being Bankrupt"—Bankruptcy Petition under Bankruptcy Act*, 1883—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 149—*Fixtures—Notice of Breach by Landlord—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.] A lease (executed in 1880) of a mill and warehouse, for twenty-one years, contained a covenant by the lessors with the lessees (inter alia): (4) that certain articles mentioned in a schedule should be the property of the lessees, and should be removable by them, they making good all damage done by such removal. The articles mentioned in the schedule were iron columns, beams, floors, brick piers, and things ejusdem generis. There was a proviso (1) that in case (inter alia) the lessees should during the term be bankrupts, or file a petition in liquidation, the term should cease; (2) that the lessees might by notice determine the term at the end of seven or fourteen years; (3) that on the determination or cesser of the term all the machinery, and

also all the buildings erected by the lessees (other than certain specified buildings) should be their property and should be removed by them previously to the determination or cesser of the term, unless it should be then mutually agreed that the lessors should purchase them, the lessees, in case of removal, to make good all damages which might be caused by such removal. After the Bankruptcy Act, 1883, came into operation, the lessees presented a bankruptcy petition, and a receiving order was made:—*Held*, first, that the presentation of the petition caused a forfeiture of the term; secondly, that notwithstanding the forfeiture, the official receiver was entitled to the articles mentioned in clause (4) of the covenant and clause (3) of the proviso as being property of the lessees.—*Quære*, whether the receiver was entitled to enter and remove the articles or whether he could only call on the lessors to deliver them to him.—*Held*, further, that s. 14 of the Conveyancing Act, 1881, had no application. EX PARTE GOULD. IN RE WALKER - **454**

17. —— *Practice—Application for Order of Discharge before close of Bankruptcy—Assent of Creditors—Meeting summoned by Trustee—Advertisement—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 21, 48, 78—*Bankruptcy Rules*, 1870, *rr.* 89, 95, 138, 142.] When a meeting of the creditors of a bankrupt under the Bankruptcy Act, 1869, is summoned by the trustee (for the purpose, e.g. of ascertaining whether the creditors will assent to an application by the bankrupt for an order of discharge) it is only necessary that it should be summoned by means of a notice sent by the trustee to each creditor in accordance with the provisions of rule 95; it is not necessary that advertisements of the meeting should be published as provided by rule 89 in reference to the first meeting of the creditors. Sect. 78 has not the effect of incorporating the Bankruptcy Rules into the Act for the purposes of construction. But, even if the rules are to be considered as, by virtue of s. 78, incorporated into the Act, s. 21 does not make rule 89 applicable to meetings summoned by the trustee, a special provision for the summoning of such meetings being made by rule 95. EX PARTE COHEN - - - **C. A. 56**

18. —— *Pending Action in Chancery Division—Non-payment of Trust Money into Court—Motion for Writ of Attachment—Bankruptcy of Trustee—Debt provable in Bankruptcy—Jurisdiction of Bankruptcy Court to interfere—Bankruptcy Act*, 1883, *s.* 9, *sub-s.* 1, *and s.* 10, *sub-s.* 2.] The plaintiff in an action in the Chancery Division having failed to pay into Court, when ordered, a sum of money which he had received in a fiduciary capacity, was served with a notice of motion for a writ of attachment against him. He thereupon filed his petition in bankruptcy, and applied to the Court of Bankruptcy under s. 9 of the Bankruptcy Act, 1883, to stay further proceedings in the action on the ground that the claim against him was a debt provable in his bankruptcy:—*Held*, that his application must be refused, for that no good reason was shewn why the Court of Bankruptcy should interfere.—*Semble*, the jurisdiction conferred on the Court of Bankruptcy by s. 9 of the Bankruptcy Act, 1883, is discretionary, and will

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not, as a general rule, be exercised in favour of a bankrupt personally, where he has by some misconduct in some other proceedings rendered himself liable to imprisonment. IN RE MACKINTOSH. EX PARTE MACKINTOSH - - - - 235

19. —— *Practice—Application to Court by Equitable Mortgagee for a Sale—Insufficient Security—Conduct of Sale—Costs of Trustee—Bankruptcy Rules*, 1870, *rr.* 78, 79, 80—*Bankruptcy Rules*, 1883, *rr.* 68–70.] When an equitable mortgagee applies to the Court to realize his security, the conduct of the sale is in the discretion of the Court. As a general rule where the security is sufficient the conduct of the sale will be given to the trustee, but where the security is insufficient the conduct of the sale will be given to the mortgagee. In either case the costs, charges, and expenses of the trustee, properly incurred, will be a first charge upon the proceeds of sale. IN RE JORDAN. EX PARTE HARRISON - - 228

20. —— *Bankruptcy Petition—Domicil of Debtor—Onus of Proof—Officer in British Army serving out of England—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 1 (*d*).] Sub-s. 1 (*d*) of s. 6 of the Bankruptcy Act, 1883, enacts that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless (inter alia) "the debtor is domiciled in England":—*Held*, that this must be taken to mean domiciled in England, as distinguished from Scotland or Ireland.—The onus is, in the first instance, on the petitioning creditor to prove the domicil, though he may adduce such primâ facie evidence as will throw the burden of disproving the domicil on the debtor. But the mere fact that the debtor bears an English name, and is an officer in the British army, does not raise any presumption that his domicil is English as distinguished from Scotch or Irish, inasmuch as his domicil of origin might have been Scotch or Irish, and in either of those cases he would not by entering into the British army have lost his domicil of origin.—*Yelverton* v. *Yelverton* (1 Sw. & Tr. 574), and *Brown* v. *Smith* (15 Beav. 444), approved and followed. The cases relating to Anglo-Indian domicil commented on and explained. EX PARTE CUNNINGHAM. IN RE MITCHELL - - - - C. A. 418

21. —— *Petition—Receiving Order—Power of Court to refuse—"Sufficient Cause"—Execution of Creditors' Deed—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*a*), *s.* 7, *sub-s.* 3, *ss.* 15, 16, 17, 18—*Official Receiver — Appearance on Appeal—Costs.*] The fact that shortly before the presentation of a bankruptcy petition against a debtor he has, with the assent of a large majority of his creditors, executed a deed assigning the whole of his property to trustees appointed by the creditors, to be administered by them as in bankruptcy, is not, within the meaning of sub-s. 3 of s. 7 of the Bankruptcy Act, 1883, a "sufficient cause" for refusing to make a receiving order on the petition.—As a general rule the official receiver, though served with a notice of appeal, ought not to appear on the hearing, unless there are special circumstances which he desires to bring before the Court, and in the absence of special circumstances he will not be allowed his costs of appearance. EX PARTE DIXON - C. A. 118

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22. —— *Petition by Debtor—Receiving Order—Payment of Creditors in full—Power to rescind Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 5, 8, 104.] A debtor presented a bankruptcy petition and a receiving order was made. The debtor's father, who was a partly secured creditor, immediately afterwards paid all the unsecured creditors in full. The only other creditor was fully secured. The debtor then applied to the Court to rescind the receiving order and to allow him to withdraw his petition. The application was assented to by the fully secured creditor and by the father. The judge held that he had no jurisdiction to rescind the order, but he made an order staying all further proceedings under the order:—*Held*, that there was jurisdiction to grant the application. EX PARTE WEMYSS. IN RE WEMYSS - - - - - 244

23. —— *Bankruptcy Petition—Composition—Reasonableness—Rash and hazardous Speculation—Retrospective Effect of Act—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 28, *sub-s.* 3 (*d.*).] In determining whether a composition accepted by creditors under the provisions of s. 18 is reasonable, the Court must exercise its own judgment, though it will take into account the fact that the creditors are mainly interested in the question.—The Court must have regard to the debtor's assets and liabilities, and if, for a large proportion of the debts set down in his statement of affairs proofs have not been tendered, or if the Court considers that the proofs which have been tendered require to be investigated by a trustee, the Court ought to decline to approve of the composition.—The Court of Appeal will not overrule the exercise of the discretion of the judge of first instance as to the approval of a composition, unless it is clearly satisfied that he was wrong.—The quasi penal provisions of sub-ss. 2 and 3 of s. 28 are retrospective, i.e., they apply to acts done by the debtor before the Act came into operation, if the proceedings are instituted under that Act.—A trader, after he knew that one of his debtors who owed him about 32,000*l.* was in pecuniary difficulties, allowed him, in the course of eighteen months, to increase his debt to 65,000*l.*, and to the extent of 11,000*l.* this increase was due to accommodation bills. The trader then stopped payment, and presented a bankruptcy petition. The debt of 65,000*l.* was apparently irrecoverable:—*Held*, that the debtor had been guilty of rash and hazardous speculations, and that on this ground (inter alia) the Court ought to refuse to approve of a composition which his creditors had, under the provisions of s. 18, agreed to accept. EX PARTE ROGERS. IN RE ROGERS - - - - - 438

24. —— *Bankruptcy Petition—Scheme of Arrangement—Approval of Court—Reasonableness—Discharge of Debtor left to Discretion of Committee of Inspection—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 18.] A scheme for the arrangement of the affairs of debtors who had presented a bankruptcy petition, duly assented to by the creditors, as provided by s. 18 of the Bankruptcy Act, 1883, contained, inter alia, provisions for the appointment of a trustee and a committee of inspection, and also a provision that "the debtors

shall be discharged when the committee of inspection shall so resolve" :—*Held*, that the latter provision was not in accordance with the intention of the Act, and was unreasonable, and that, though the debtors asked that the scheme might be approved by the Court, the approval ought not to be given. EX PARTE CLARK. IN RE CLARK [C. A. 426

25. —— *Petition—Secured Creditor—Valuation of Security—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6 (*sub-s.* 2); *sched.* 1, *rr.* 10, 12; *sched.* 2, *rr.* 9, 10, 11, 12, 13.] When a secured creditor presents a bankruptcy petition against his debtor it is not necessary that the estimate given by the petitioner of the value of his security should be a true estimate; but, if an adjudication is made, the trustee in the bankruptcy will be entitled to redeem the security at the amount of the petitioner's estimate. EX PARTE TAYLOR [128

26. —— *Notice—Receiving Order—Notice in Name of Partners—Bankruptcy of one Partner before Hearing of Petition—Right of solvent Partner to receive Partnership Assets as against Trustee of bankrupt Partner—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).] After the bankruptcy of a partner and the appointment of a trustee of his property his solvent partner has a right to receive, and can give a good discharge for, the partnership assets, and is entitled, for the purpose of collecting or recovering the assets, to use the name of the trustee, upon giving him an indemnity.—After one of two partners had filed a liquidation petition and a receiver had been appointed, a judgment was recovered in an action previously commenced in the names of the two partners against O., a debtor of the firm. A bankruptcy notice in the names of the two partners was then served on O.; he failed to comply with it within the seven days limited for the purpose, and a bankruptcy petition was presented against him in the names of the two partners. Before this petition came on to be heard, the creditors of the partner who had filed the liquidation petition had resolved on a liquidation by arrangement, and had appointed a trustee of his property :—*Held*, that though there was a good act of bankruptcy, a receiving order could not properly be made against O., unless the trustee in the liquidation was joined as a co-petitioner. EX PARTE OWEN - C. A. 113

27. —— *Bankruptcy Notice—"Final Judgment"—Company—Winding-up—Contributory—Balance Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).] A "balance order," made in the voluntary winding-up of a company on a contributory, for the payment of calls which had been made upon him before the commencement of the winding-up, is not a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, and therefore a bankruptcy notice cannot be issued in respect of such an order. EX PARTE WHINNEY. IN RE SANDERS - - - - - 476

28. —— *Bankruptcy Notice—"Final Judgment"—Executor of original Judgment Creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Rules of Supreme Court*, 1883, *Order XLII., r.* 23.] The executor of a creditor who has obtained a final judgment is not entitled to issue a bankruptcy notice against the judgment debtor, unless he has obtained leave from the Court, under rule 23 of Order XLII. of the Rules of the Supreme Court of 1883, to issue execution on the judgment.—Under sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, the creditor who issues a bankruptcy notice must be in a position to issue execution on the judgment. EX PARTE WOODALL. IN RE WOODALL - - - C. A. 479

29. —— *Transfer of Proceedings—Certificate of Judge — Discretion — Appeal — Costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 97 (*sub-s.* 2), 104 (*sub-s.* 2)—*Bankruptcy Rules*, 1883, *rr.* 16, 17, 111 (3).] The refusal of a judge of a county court to grant a certificate, under rule 16 of the Bankruptcy Rules, 1883, that in his opinion the proceedings under a bankruptcy petition would be more advantageously conducted in another court, is an order from which an appeal lies, if the judge has refused to exercise his discretion in the matter.—In such a case the Court of Appeal, if it is of opinion that the certificate ought to have been granted, will not refer the matter back to the county court, but will itself grant the certificate.—Two partners in trade presented a bankruptcy petition in a county court. Their statement of affairs shewed that they had lost nearly 200,000*l.* in five years' trading. Some of the creditors applied to the judge for a certificate that in his opinion the proceedings would be more advantageously conducted in the London Court. The judge refused the application, on the ground that it was premature. An appeal was presented, but was afterwards withdrawn, and on this occasion some correspondence took place between the solicitors of the applicants and the solicitors of other creditors who opposed the proposed transfer. The application was afterwards renewed, and there was evidence that the debtors owed a large amount to creditors in London, Liverpool, and other places, and that, in order to carry out a proper investigation of their accounts, it would be necessary to refer to the books of various merchants in London with whom they had traded, and also to the books of their bankers and of the bankers' London agents. The judge refused the application, on the ground that the applicants were estopped by the correspondence between the solicitors from making it :—*Held*, that there was no such estoppel, and that, as the judge had therefore decided on a wrong ground, he had in effect refused to exercise his discretionary power, and there was an appeal from his decision.—*Held*, also, that under the circumstances the proceedings would be more advantageously conducted in the London Court, and that the certificate asked for ought to have been granted, and the Divisional Court itself granted the certificate.—Per Cave, J. If an agreement not to renew the application for a certificate had been in fact entered into between the solicitors of the applicants and the solicitors of the other creditors, it could not have affected the power of the Court to make the certificate, though it might have affected the right of the applicants to costs.

BANKRUPTCY—*continued.*

—Order made that the applicants should have their costs out of the debtors' assets, in case the creditors should ultimately approve of the proposed transfer. EX PARTE SOANES. IN RE WALKER [484

30. —— *Proof of Debt—Evidence—Admissibility—Bankrupt's Statement of Affairs—Judgment Debt—Inquiry into Consideration.*] An admission of a debt, contained in a bankrupt's statement of his affairs made after the commencement of the bankruptcy proceedings, is not evidence as against his creditors of the existence of a debt, even though the statement was verified by his oath (without cross-examination), and he has since died.—The Court of Bankruptcy is not conclusively bound by a judgment for a debt, but has power, on a claim to prove the debt in the bankruptcy of the judgment debtor, to inquire into the consideration for the debt.—But, *quære*, whether it will do so unless a primâ facie case of suspicion is shewn. EX PARTE REVELL. IN RE TOLLEMACHE (No. 1.) - - - C. A. 720

31. —— *Proof of Debt—Breach of Trust by Firm—Joint and several Liability—Joint Judgment against Firm—Merger of several Liability—Bankruptcy of Firm—Right of Proof against Separate Estate.*] Where a firm is adjudicated bankrupt on a judgment debt recovered against the firm jointly, if the partners are also severally liable in respect of the same matter by reason, for instance, of its arising out of breach of trust, the several liability of the partners is not, solely by reason of the creditor having sued for and obtained a joint judgment, merged in such judgment, so as to preclude a proof by the judgment creditor against their respective separate estates. IN RE DAVISON - - - - 50

32. —— *Proof of Debt—Partner in one Firm the secret and sole Principal in another Firm—Bankruptcy of both Firms—Right of Proof by one Firm against the other.*] A. and B. traded in partnership as A. & Co. in England and abroad, A. managing the home business and B. the branch abroad. C. and D. carried on business in England as D. & Co. under an agreement by which C. was to be the sole principal of D., who was to be the manager of the business at a salary with a share of profits. Business transactions took place in England between A. & Co. and D. & Co., and on the bankruptcy of both firms a large balance was due to A. & Co. from D. & Co. C. was in fact the agent of A., who was the secret and sole principal of D., but this was unknown to B. and D. until after the bankruptcy, and D. had held himself out to A. & Co. and others as a principal. The trustee of A. & Co. tendered a proof against the estate of D. for the balance due from D. & Co. to A. & Co.:—*Held*, that the proof could not be sustained, for that, under the circumstances, there was no contract between D. and A. that D. should pay for the goods that had been supplied. IN RE WAKEHAM - - - - - 43

33. —— *Leasehold Interest of Bankrupt—Disclaimer by Trustee—Leave of Court—Conditions imposed—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules*, 1871, *r.* 28.] A lease of land and minerals was granted to two

BANKRUPTCY—*continued.*

partners in trade as joint tenants. The partnership was afterwards dissolved, on the terms that the business should be carried on by one of the partners alone, and that he should purchase the interest of the other for 12,000*l.*, which was to be paid in forty equal half-yearly instalments. The retiring partner covenanted that he would stand possessed of his share and interest in the demised premises in trust for the continuing partner. The continuing partner covenanted with the retiring partner to pay the 12,000*l.* in the manner agreed upon, and assigned to him the buildings, machinery, and fixtures on the demised premises by way of mortgage to secure the payment of the 12,000*l.*, and covenanted that the leasehold premises should stand charged therewith. A year afterwards the continuing partner filed a liquidation petition, under which a trustee of his property was appointed. The trustee occupied the demised property for some time with a view to the benefit of the debtor's estate. The rent due under the lease was paid to the landlord by the retired partner:—*Held*, that leave to disclaim the debtor's interest in the lease ought to be given to the trustee only on condition of his paying to the retired partner the rent of the premises from the date of the trustee's appointment until the day when his beneficial occupation thereof ceased. EX PARTE GOOD. IN RE SALKELD - C. A. 731

34. —— *Practice—Sheriff's Fees—Poundage—"Costs of Execution"—Bankruptcy Act*, 1883, *s.* 46, *sub-ss.* 1, 2.] When the bankruptcy of a judgment debtor supervenes after seizure, but before sale, by the sheriff under a writ of fi. fa., the sheriff is not entitled to poundage under the words "costs of execution" in sub-s. 1 of s. 46 of the Bankruptcy Act, 1883. IN RE LUDMORE 415

35. —— *Conflicting Claims between Strangers to the Bankruptcy—Jurisdiction—Bankruptcy Act*, 1869, *s.* 72—*Bankruptcy Act*, 1883, *s.* 102, *sub-s.* 1.] The jurisdiction conferred on the Court of Bankruptcy by sub-s. 1 of s. 102, of the Bankruptcy Act, 1883, is identical with that conferred on that Court by s. 72 of the Bankruptcy Act, 1869.—Where, therefore, there are conflicting claims to any part of a bankrupt's property, between parties who are strangers to the bankruptcy, and in which the trustee in bankruptcy has no interest, the Court of Bankruptcy will decline to adjudicate upon the questions at issue. IN RE LOWENTHAL. EX PARTE BEESTY - - - - 238

BETTING—Employment of agent to bet in his own name—How far authority revocable
See GAMING. [779

BICYCLE GROUND—Races—Betting—Liability of manager - - - - 377
See GAMING. 2.

BILL OF EXCHANGE—Bankruptcy—Specific appropriation—Acceptances for accommodation of drawer - - 740
See BANKRUPTCY. 7.

—— Bankruptcy—Specific appropriation of consignments—Rights of bill-holder and drawer - - - - 766
See BANKRUPTCY. 6.

BILL OF EXCHANGE—*continued.*

—— Company—No power to accept bills—Acceptance by directors "for and on behalf of company"—Personal liability 360
See COMPANY.

BILL OF SALE—*Agreement to pay upon Demand—Power to seize and sell on Default in such Payment—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, 13.] A bill of sale, given by way of security for payment of money, contained an agreement by the grantor to pay the sum advanced and interest upon demand made in writing, and gave power to the grantee to seize and sell the goods on default in payment on demand in writing:—*Held*, that the agreement to pay the money on demand was not an agreement to pay it at a stipulated time in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, and that therefore the bill of sale was void by s. 9 of that Act:—*Held*, also, by Brett, M.R., and Fry, L.J. (Bowen, L.J., doubting), that the bill of sale was void on the ground that it gave power to sell on default in payment on demand without waiting for five clear days as required by s. 13. HETHERINGTON *v.* GROOME - - - C. A. 789

2. —— *Statement of Consideration—Solicitor acting for both Parties—Deduction of Bill of Costs—Bills of Sale Act*, 1878, *s.* 8.] A bill of sale in its operative part was stated to be given "in consideration of the sum of 10*l.* now paid by H. to C." In the preparation of the bill of sale D. acted as solicitor for both H. and C., and on the execution of the deed retained, with C.'s consent, 9*l.* out of the 10*l.* in payment of his bill of costs in the matter, and only handed C. the balance of 1*l.*:—*Held*, that, under the circumstances, the consideration was truly stated in the deed so as to satisfy s. 8 of the Bills of Sale Act, 1878, for that, on the execution of the deed, D. no longer held the money as agent for H. or had any duty to perform towards him, but held the money as C.'s agent, and could with C.'s consent retain the amount of his bill of costs.—*In re Firth* (19 Ch. D. 419) distinguished. IN RE CANN 36

3. —— *Consideration, Statement of—Growing Crops—After-acquired Property—"Separately assigned"—"By way of Security"—"Specifically described"—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 7—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 5, 6, *sub-s.* 1, *ss.* 8, 9, *and sch.*] A bill of sale, duly registered and dated the 30th of April, 1883, and made between one grantor and three grantees, recited that two of the grantees (R. & D.) were liable as sureties for the grantor on a bill of exchange for 60*l.*, which had been discounted at a bank: that two of the grantees (D. & E.) and one O. were liable as sureties for the grantors on a bill of exchange for 100*l.*, which had been discounted at the same bank; that the grantor was unable to meet the said bills, and was also in urgent need for a further sum of 45*l.*, and had applied to the grantees to take up the said two bills of exchange and make him a further advance of 45*l.*, which they had agreed to do in consideration of the grantor entering into the bill of sale, "for the purpose of securing repayment to them with interest as well of the said sum of 45*l.*, as also

BILL OF SALE—*continued.*

of the said two bills of 60*l.* and 100*l.* respectively with all expenses due thereon." The bill of sale then witnessed that "in consideration of the sum of 45*l.* now paid to the said" grantor "by the said grantees (the receipt whereof the said" grantor "hereby acknowledges), and of the covenant on the part of the grantees hereinafter contained," the grantor covenanted with the grantees on demand to "pay to the grantees all and every the said several sums of 60*l.*, 100*l.*, and 45*l.*, and all costs, charges, and expenses," and meanwhile to pay interest thereon. The bill of sale also witnessed that "in further pursuance of the said agreement and in consideration of the premises," the grantor assigned unto the grantees "all the crops now growing, or which shall at any time hereafter during the continuance of this security be growing in or upon" certain farmlands in the grantor's occupation, "and also all horses, cattle, carts, carriages, implements of husbandry, farming machinery, tools, utensils, hay, straw, consumable stores, live and dead stock, furniture, and household effects, which now are, or at any time hereafter during the continuance of this security shall be, in, upon, or about the same farm, or the farmhouse, barns, stables, or other buildings or erections thereon; and all which said crops, stock, implements, furniture, and effects are intended to be specifically described in the schedule hereunder written (but the said schedule is not to abridge the other words of description contained in these presents"). The bill of sale contained many covenants by the grantor, but none by the grantees. It did not contain the phrase "by way of security" amongst the operative words. The schedule to the bill of sale contained a list of live stock, and the words "household furniture and effects," without any list or inventory thereof, and also under the heading "crops" a list of fields with their names, acreage, and the nature of the crops growing thereon. The instruments described as "bills of exchange" were, in truth, promissory notes, and had not been discounted. The goods and chattels comprised in the bill of sale were seized on behalf of execution creditors of the grantor, and an interpleader issue was directed between the grantees and the execution creditors, but no after-acquired property was seized on behalf of the execution creditors:—*Held*, that the bill of sale was valid under the Bills of Sale Act (1878) Amendment Act, 1882, except as to after-acquired property and the household furniture and effects; for the consideration was stated with sufficient accuracy, and "was truly set forth" within the meaning of s. 8, notwithstanding the misdescription of the promissory notes, and that the agreement to take up the bills recited in the deed was in effect a covenant to take up the promissory notes; that the grant of the after-acquired property did not invalidate the grant of the existing property; that the growing crops were separately assigned within the true meaning of the statute; that the omission of the words "by way of security" was rectified by the other terms of the deed; that in the schedule the chattels, except the "household furniture and effects," were "specifically described" within the meaning of s. 4; but that the bill of sale was void as

BILL OF SALE—*continued.*
against execution creditors of the grantor in respect of any property afterwards acquired by the grantor, and also as to the household furniture and effects because they were not specifically described within the meaning of s. 4. ROBERTS *v.* ROBERTS - - - - **C. A. 794**

4. —— *Several Mortgagees—Consolidation of Securities—Form—Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.] A bill of sale which is in its terms so complicated as to substantially vary from the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, is void by s. 9 of that Act, notwithstanding it may not contravene any of the other sections.—Therefore a bill of sale made between the grantor and four sets of mortgagees to secure different debts owing to each respectively at different times, with a declaration that in case of default in payment of any sum thereby secured or of any other default mentioned as a cause of seizure in s. 7 of that Act, it should be lawful for the mortgagees to seize and sell the goods assigned, was held by the Court of Appeal, reversing the decision of the Queen's Bench Division (12 Q. B. D. 132), to be not in conformity with the form in the schedule, and void.—*Semble*, the sum secured should be made payable on a specified day, and a bill of sale making it payable on demand is contrary to such form. MELVILLE *v.* STRINGER [**C. A. 392**

BILL OF LADING—Incorporation of conditions of charterparty - - - **317**
See SHIP. 3.

—— Indorsement by way of pledge—Liability of indorsee for freight - - **159**
See SHIP. 4.

BURIAL BOARD—*Appointment of Burial Board* —18 & 19 *Vict. c.* 128, *s.* 12.] The existence of a legally constituted burial board for the whole of a parish, does not prevent the vestry of an ecclesiastical district formed out of such parish under 1 & 2 Wm. 4, c. 38, and which does not separately maintain its own poor, from legally appointing a burial board for such district under 18 & 19 Vict. c. 128, s. 12.—Decision of the Queen's Bench Division (11 Q. B. D. 134) reversed. THE QUEEN *v.* OVERSEERS OF THE PARISH OF TONBRIDGE - - - - **C. A. 339**

—— Income tax—Application of surplus income in aid of poor-rate - - - **9**
See REVENUE.

CARRIER — Railway company — Inequality of tolls—Group rates - - - **674**
See RAILWAY.

CASES:—*Allen* v. *Richardson* (13 Ch. D. 524) dissented from - - - **351**
See VENDOR AND PURCHASER.

—— *Atwood* v. *Sellar* (4 Q. B. D. 342; 5 Q. B. D. 286) distinguished - - **69**
See INSURANCE (MARINE.)

—— *Besley* v. *Besley* (9 Ch. D. 103) dissented from - - - - **351**
See VENDOR AND PURCHASER.

CASES—*continued.*
—— *Birmingham Gas Light Co., Ex parte* (Law Rep. 11 Eq. 615) commented on **753**
See BANKRUPTCY. 12.

—— *Bos* v. *Helsham* (Law Rep. 2 Ex. 72) followed [**351**
See VENDOR AND PURCHASER.

—— *Brown* v. *Smith* (15 Beav. 444) approved and followed - - - **418**
See BANKRUPTCY. 20.

—— *Cann* v. *Cann* (3 Sim. 447) followed - **351**
See VENDOR AND PURCHASER.

—— *Counsel* v. *Garvie* (Ir. Rep. 5 C. L. 74) considered - - - - **835**
See COUNTY COURT. 3.

—— *Custance* v. *Bradshaw* (4 Hare, 315) discussed - - - - **275**
See REVENUE. 2.

—— *Edmondson, Re* (17 Q. B. 67) overruled **586**
See LANDS CLAUSES ACTS.

—— *Electric Telegraph Company* v. *Salford* (11 Ex. 181) followed - - **700**
See POOR-RATE.

—— *Firth, In re* (19 Ch. D. 419) distinguished
See BILL OF SALE. 2. [**36**

—— *Frith* v. *Forbes* (4 D. F. & J. 409) distinguished - - - - **766**
See BANKRUPTCY. 6.

—— *Gothenburg Commercial Co., In re* (29 W. R. 358) followed - - - **740**
See BANKRUPTCY. 7.

—— *Hill, Ex parte* (6 Ch. D. 63) commented on
See BANKRUPTCY. 12. [**753**

—— *Heske* v. *Samuelson* (12 Q. B. D. 30) approved and followed - - **583**
See MASTER AND SERVANT.

—— *Hodsoll* v. *Baxter* (E. B. & E. 884) followed
See PRACTICE. 10. [**302**

—— *Maude* v. *Baildon Local Board* (10 Q. B. D. 393) questioned - - - **184**
See LOCAL GOVERNMENT ACTS.

—— *Munson* v. *Thacker* (7 Ch. D. 620) dissented from - - - - **351**
See VENDOR AND PURCHASER.

—— *Rippon* v. *Dawding* (Ambl. 565) commented upon - - - - **147**
See HUSBAND AND WIFE.

—— *Ryder* v. *Wombwell* (Law Rep. 3 Ex. 90) dissented from - - - **410**
See INFANT. 2.

—— *Schulte, Ex parte* (Law Rep. 9 Ch. 409) followed - - - - **727**
See BANKRUPTCY.

—— *Shapcott* v. *Chappell* (12 Q. B. D. 58) questioned - - - - **403**
See PRACTICE.

—— *Yelverton* v. *Yelverton* (1 Sw. & Tr. 574) approved and followed - - **418**
See BANKRUPTCY. 20.

CERTIFICATE—Superintending architect—How far conclusive—Metropolis Management Acts - - - - - **878**
See METROPOLIS MANAGEMENT ACTS.

CHARGING ORDER—Proceeds of fi. fa.—Solicitor's costs of action—Priority - **543**
See SOLICITOR 3.

CHARGING ORDER—*continued.*

—— Solicitor—Lien - - - - - 666
See Solicitor. 2.

CLUB — Gaming — Baccarat — Liability of proprietor and players - - - 503
See Gaming. 5.

COMMITMENT, ORDER OF—Appeal from judge of High Court—Court of Appeal 901
See Bankruptcy. 11.

COMPANY—*No Power to accept Bills—Acceptance by Directors "for and on behalf of Company"—Personal Liability.*] A bill of exchange payable to order and addressed to the B. & I. Company, which was incorporated under local Acts and had no power to accept bills, was accepted by the defendants, who were two of the directors of the company, and also by the secretary, as follows:—"Accepted for and on behalf of the B. & I. Company, G. K., F. S. P. directors; B. W. secretary." The bill was so accepted and given by the defendants to the drawer, the engineer of the company, on account of the company's debt to him for professional services, and although he was told by the defendants that they gave him the bill on the understanding that he should not negotiate it, but merely as a recognition of the company's debt to him, as the company had no power to accept bills, yet the defendants knew that he would get it discounted, and they meant that he should have the power of doing so. The bill was indorsed by the drawer to the plaintiffs for value, and without notice of the understanding between him and the defendants:—*Held*, affirming the decision of the Queen's Bench Division, that the defendants were personally liable, as by their acceptance they represented that they had authority to accept on behalf of the company, which being a false representation of a matter of fact and not of law, gave a cause of action to the plaintiffs, who had acted upon it. West London Commercial Bank *v.* Kitson - - - - - C. A. 360

2. —— *Share Certificate issued by Secretary—Forgery—Principal and Agent—Scope of Employment.*] It was the duty of a secretary of a company to procure the execution of certificates of shares in the company with all requisite and prescribed formalities, and to issue them to the persons entitled to receive the same. By a resolution of the directors of the company it was provided that certificates of shares should be signed by one director, the secretary, and the accountant. The secretary of the company having executed a deed purporting to transfer certain shares in the company to one G., a purchaser of such shares, issued to G. a certificate stating that he had been registered as the owner of the shares. Such certificate was in the usual and authorized form, and sealed with the company's seal, but the signature of the director appended thereto was a forgery, and the seal of the company was, in fact, affixed thereto without the authority of the directors.—G. deposited the certificate with the plaintiff as a security for advances, and subsequently executed a transfer of the shares to the plaintiff. Neither G. nor the plaintiff had any knowledge or reason to suspect that the certificate was otherwise than a genuine document, or that the matters stated therein were untrue.—The company refused to register the

COMPANY—*continued.*

plaintiff as owner of the shares, stating that there were no such shares standing in G.'s name in their books:—*Held*, that the company were estopped by the certificate issued by their secretary from disputing the plaintiff's title to the shares. Shaw *v.* Port Philip Gold Mining Company - - - - - 103

3. —— *Prospectus — False and Fraudulent Statements.*] The plaintiff was a dealer in stocks and shares, and had formerly been a member of the Stock Exchange. The defendants were largely interested as shareholders in the Date-Coffee Company, a company whose objects were declared to be (amongst others) the acquisition of licenses to use an invention for manufacturing from dates a substitute for coffee, for which a patent had been granted to Henley (one of the defendants), and to sell, &c., the patent-rights when acquired by the company. Of this company Haymen (another of the defendants) was chairman, the defendant Tucker was the solicitor, and Henley consulting engineer.—Henley was also possessed of a patent for the manufacture and sale of date-coffee in France; and a company was formed for that purpose, called The French Date-Coffee Company, with a capital of 100,000*l.* in 100,000 shares of 1*l.* each (under substantially the same management as that of the English company), by whom Henley's patent for France was purchased for 50,000*l.*, which sum it was agreed should be divided as a bonus amongst the shareholders in the English company. Early in February, 1881, the defendants prepared and issued a prospectus of the French company, containing the following passage,—"From the success attending the company formed for the working of Henley's English patent, when a duty of 2*d.* per lb. is payable, and the coffee sold at 1*s.* per lb., the directors feel justified in stating they confidently believe the profits of this company will be more than sufficient to pay dividends of at least 50 per cent. on the nominal capital, and will exceed those of the company working the English patent, which, having only been formed a little over twelve months, has entered into a contract which will yield the return by way of annual dividends of a sum equal to the whole paid-up capital of the company of 34,000*l.*"—At the time at which this prospectus was issued the period had not arrived at which "profits" in a commercial sense could have been acquired by the English company: but the article had been sold in the English market and received with some favour, and an agreement had been entered into by the company with a merchant or broker in London to take all they could make. — The plaintiff, influenced, as he said, partly by the above statement in the prospectus, partly from information derived from another source, and partly by the favorable opinion he had formed of the article to be manufactured, purchased 100 shares in the French company, and paid the deposit. He had no connection with the English company. Owing, as it was said, to the duty imposed upon the date-coffee in England, and to other circumstances, the hopes held out in the prospectus were not realized, and the French Date-Coffee Company was ultimately wound up; and, after the lapse of nearly two

COMPANY—*continued.*
years, when the plaintiff was called upon as a contributory, he sought to recover from the defendants the sum he had paid as deposit money and the amount of calls for which he had become and would become liable, as damages for the alleged false and deceitful representations contained in the above statements in the prospectus:—*Held*, that the statements complained of, though expressing the strongest confidence that the company referred to would be successful and would make large profits by the sale of the article to be manufactured, could not fairly be read as alleging that profits in a commercial sense had actually been made, and consequently that there was no evidence which could be properly left to a jury in support of the charge of wilful and fraudulent misrepresentation. Bellairs *v.* Tucker - 562

COMPENSATION—Conditions of sale—Error discovered after execution of conveyance
See Vendor and Purchaser. [351

CONDITIONS OF SALE—Misdescription—Error discovered after execution of conveyance—Compensation - - - 351
See Vendor and Purchaser.

CONTEMPT—County court - - - 963
See Bankruptcy. 8.

CONVERSION — Realty forming partnership assets—Probate duty - - 275
See Revenue. 2.

COPYRIGHT — *Infringement — Right of representing Dramatic Piece or Entertainment—Performance of Play in Private Room—Admission without Payment*—3 *&* 4 *Wm.* 4, *c.* 15, *ss.* 1, 2.] The defendant and others joined in representing a dramatic piece in a room of an hospital, without the consent of the proprietor of the copyright in the drama. The performance was merely for the entertainment of the nurses, attendants, and others connected with the hospital, who were admitted free of charge: — *Held*, by Brett, M.R., and Bowen, L.J., Fry, L.J., dissenting, that the room where the drama was represented was not a place of public entertainment, and consequently that the defendant was not liable to damages or penalties under 3 & 4 Wm. 4, c. 15, ss. 1, 2.—Judgment of the Queen's Bench Division (12 Q. B. D. 79) affirmed. Duck *v.* Bates **C. A.** 843

CORONER—Prevention of inquest—Burning dead body - - - - 331
See Criminal Law. 2.

COSTS—Bankruptcy—Appeal—Preliminary objection - - - - 42
See Bankruptcy. 9.

—— Bankruptcy — Costs of petition — Second meeting of creditors—"Proceeding in Court - - - - 492
See Bankruptcy. 10.

—— Bankruptcy—Mortgagor and mortgagee—Application by equitable mortgagee for sale — Insufficient security — Costs of trustee - - - - 228
See Bankruptcy. 19.

—— Bankruptcy—Official receiver—Appearance on appeal - - - - 118
See Bankruptcy. 21.

COSTS—*continued.*
—— Case stated by justices—Jurisdiction 680
See Justices.

—— Payment into Court—Denial of liability—Action for several breaches of contract—Acceptance in satisfaction of all demands
See Practice. 14. [897

—— Security for—Action remitted to County Court—Practice - - - 835
See County Court. 3.

—— Solicitor—Defendant in person - 872
See Solicitor.

—— Trial by jury—Action for recovery of land—Distributive issues—Appeal - 262
See Practice. 5.

COUNTERCLAIM—Specific performance—Transfer to Chancery Division - - 540
See Practice. 17.

COUNTY COURT—*Appeal—Leave of Judge—Discretion of Judge under* 30 *&* 31 *Vict. c.* 142, *s.* 13.] A county court judge having given a defendant leave to appeal, but subject to a condition that he should pay the plaintiff's costs of the appeal in any event, and should also, in case the appeal were unsuccessful, pay the costs of the trial upon the higher scale, the Divisional Court held that it had no power to interfere with the discretion vested in him by 30 & 31 Vict. c. 142, s. 13. Goodes *v.* Cluff - - - - 694

2. —— *Jurisdiction — Maritime Causes — Actions under* 50*l.*—*Claims under Charterparties*—*County Courts Admiralty Jurisdiction Act*, 1868 (31 *&* 32 *Vict. c.* 71), *ss.* 3, 5—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 *&* 33 *Vict. c.* 51), *s.* 2.] The statutes 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, do not deprive County Courts not having Admiralty jurisdiction of their jurisdiction to try actions to recover freight under charterparties where the amount claimed is less than 50*l.* The Queen *v.* Judge of the Southend County Court - - - - 142

3. —— *Practice—Security for Costs—Remission of Action to County Court*—"*Visible Means*" *of Plaintiff*—*County Courts Act*, 1867 (30 *&* 31 *Vict. c.* 142), *s.* 10.] By the term "visible means" as used in s. 10 of the County Courts Act, 1867, is intended such means as could be fairly ascertained by a reasonable person in the position of the defendant.—On the filing of the affidavit the jurisdiction of the judge arises, and he is to satisfy himself not merely whether the plaintiff has any "visible means," but whether he has any means at all of paying the costs, and the judge has a judicial discretion whether he will make the order.—On an application under s. 10 of the County Courts Act, 1867, it appeared from the affidavit that the defendant was in possession of certain property of the plaintiff under a claim for rent for 592*9l.*, that the plaintiff had no property upon which an execution under a judgment for 240*4l.* could be levied, that his furniture had been sold under an execution, and that he had assigned his property for the benefit of his creditors. It also appeared that the plaintiff was being employed as a colliery manager at a weekly wage of 4*l.*, the employment being determinable on three months' notice, or on payment of three months' salary in lieu of notice, or without notice in the

COUNTY COURT—*continued.*
event of wilful misconduct:—*Held*, that, whether or not the salary could be attached, the plaintiff had no substantial means of paying the costs of the action in the event of the verdict being for the defendant, and that an order was rightly made under s. 10.—*Counsel* v *Garvie* (Ir. R. 5 C. L. 74) considered. Lea *v.* Parker - C. A. 835

—— Appeal—Notice of motion - - 403
See Practice.

—— Bankruptcy — Transfer of proceedings — Certificate of judge—Discretion—Appeal —Costs - - - - 484
See Bankruptcy. 29.

—— Contempt—Bankruptcy - - 963
See Bankruptcy. 8.

COUNTY RATE—Turnpike—Expiration of trust—Contribution to repair - - 623
See Highway. 2.

COVENANT— By lessor to pay rates—Water supplied by waterworks company - 202
See Landlord and Tenant. 3.

—— To pay rates, taxes, and assessments—Metropolis Local Management Acts 1
See Landlord and Tenant.

—— Quiet enjoyment—Breach—General system of drainage - - - - 547
See Landlord and Tenant. 2.

CREMATION—Prevention of inquest—Obstruction of coroner - - - 331
See Criminal Law. 2.

CRIMINAL LAW—*Evidence—Husband and Wife —Statement of Wife in presence of Husband—Admission.*] Upon the trial of a prisoner for feloniously receiving stolen property, a list of the stolen articles which the prisoner, who was a marine store dealer, had bought, was received in evidence in order to shew that he had bought at an under value. The circumstances under which the list was written were as follows: A police constable asked the prisoner to consider when he had bought the stolen property, to which the prisoner replied that his wife should make out a list of it, and on the next day the prisoner's wife in her husband's presence handed to another constable the list tendered in evidence, saying in her husband's hearing "this is a list of what we bought, and what we gave for them." The question reserved was whether such list was properly admitted in evidence:—*Held*, by the Court (Lord Coleridge, C.J., Grove, Field, Stephen and Smith, JJ.), that the list was clearly admissible in evidence. The Queen *v.* Mallory - - - - 33

2. —— *Obstructing Coroner—Coroner—Inquest by Coroners—Inquest, Destruction of Body to prevent—Misdemeanor, obstructing Justice—Burning Dead Body.*] It is a misdemeanor to burn or otherwise dispose of a dead body, with intent thereby to prevent the holding upon such body of an intended coroner's inquest, and so to obstruct a coroner in the execution of his duty, in a case where the inquest is one which the coroner has jurisdiction to hold. A coroner has jurisdiction to hold, and is justified in holding, an inquest if he honestly believes information which

CRIMINAL LAW—*continued.*
has been given to him to be true, which, if true, would make it his duty to hold such inquest. The Queen *v.* Stephenson - - - 331

3. —— *Larceny—Bailment of Money—Larceny by Bailee.*] A prisoner was convicted of larceny under the following circumstances:—The prosecutor gave a mare of his into the care of the prisoner, telling him that it was to be sold on the next Wednesday. On the next Wednesday the prosecutor did not go himself to sell his mare, but sent his wife, who went to where the prisoner was and saw him riding the mare about a horse fair, and sell her to a third party, and receive on such sale some money. The prosecutor's wife after such sale asked the prisoner to give her the money, saying she would pay his expenses; this the prisoner declined to do, and eventually he absconded with the money and without accounting:—*Held*, by the Court (Lord Coleridge, C.J., Grove, Field, and Smith, JJ., Stephen, J., dissenting) that there was evidence that the prisoner was a bailee of the money thus paid to him, and that the conviction could be supported. The Queen *v.* De Banks - - - - 29

CROPS—Bill of sale—Separate assignment 794
See Bill of Sale. 3.

DISCLAIMER—Bankruptcy—Leasehold interest of bankrupt—Conditions imposed 731
See Bankruptcy. 33.

—— Bankruptcy—Leasehold interest of bankrupt—Fixtures - - - 738
See Bankruptcy. 14.

DOCK COMPANY—Railway ancillary to docks—Taking railway plant in execution 320
See Railway. 2.

DOMICILE—Bankruptcy—Officer in British army serving out of England - - 418
See Bankruptcy. 20.

DRAMA — Copyright — Infringement — Private room - - - - 843
See Copyright.

EASEMENT—*Prescription Act* (2 & 3 *Wm.* 4, *c.* 71), *ss.* 2, 4, 5, 6—*Right to use Way for the Removal of Timber—User at long Intervals—"Enjoyment for full period of Twenty Years."*] In an action where a right of way was claimed under the Prescription Act (2 & 3 Wm. 4, c. 71), in respect of twenty years' user as of right, it appeared that the way had only been used by the party claiming it—the defendant—for the removal of wood cut upon an adjoining close. The wood was cut upon this close at intervals of several years; the last cutting having been in the year before the action was commenced, the one next previous twelve years before, and the next at another interval of twelve years. Between these intervals the road was occasionally stopped up, but the defendant used it as often as he wished while the wood was being cut:—*Held*, that there had not been an uninterrupted enjoyment of the way for twenty years within the meaning of the Prescription Act, which did not apply to so discontinuous an easement as that claimed.—Judgment of the Queen's Bench Division (11 Q. B. D. 715) affirmed. Hollins *v.* Verney - - 304

ELECTIONS, MUNICIPAL - - - 388
See MUNICIPAL CORPORATION.

ELEMENTARY EDUCATION—*Education Acts*, 1870 (33 & 34 *Vict. c.* 75), *s.* 74, *and* 1876 (39 & 40 *Vict. c.* 79)—*By-laws—Non-Attendance at School — Reasonable Excuse — Employment of Child.*] A school board made a by-law under s. 74 of the Elementary Education Act, 1870, providing that "the parent of every child of not less than five nor more than thirteen years of age shall cause such child to attend school, unless there be a reasonable excuse for non-attendance," and that "any of the following reasons shall be a reasonable excuse, namely, that the child is under efficient instruction in some other manner; that the child has been prevented from attending school by sickness or any unavoidable cause; that there is no public elementary school open, which the child could attend, within two miles from the residence of such child." Where it was shewn that non-attendance was caused by the child, a girl aged twelve, with fair elementary instruction, having been in respectable employment, earning wages, which she gave to her parents, who were poor, industrious, and respectable people, and applied them to the support of their other children, whom otherwise, from no fault of the parents, they would have been unable sufficiently to support:—*Held*, that these facts constituted a "reasonable excuse" for non-attendance. LONDON SCHOOL BOARD *v.* DUGGAN 176

2. —— *Board School—School Hours—Home Lessons—Unlawful Detention of Scholar—Assault —Elementary Education Acts*, 1870 (33 & 34 *Vict. c.* 75) *and* 1876 (39 & 40 *Vict. c.* 79).] The Elementary Education Acts, 1870 and 1876, do not authorize the setting of lessons to be prepared at home by children attending a board school. The detention at school after school hours of a child for not doing home lessons is therefore unlawful, and renders the master who detains the child liable to be convicted for an assault. HUNTER *v.* JOHNSON - - - - - 225

—— School board—Poor-rate—Rateability 929
See POOR-RATE.

EMPLOYER AND WORKMAN—Employer's Liability Act, 1880—Omnibus conductor—"Journeyman"—"Labourer" - 832
See MASTER AND SERVANT. 2.

EVIDENCE—*Hearsay—Pedigree—Proof of Birth —Declaration of Deceased Parent.*] The rule which admits hearsay evidence in pedigree cases is confined to the proof of pedigree, and does not apply to proof of the facts which constitute a pedigree, such as birth, death, and, marriage, when they have to be proved for other purposes.—Therefore in an action for goods sold, to which the defence was infancy, an affidavit stating the date of the defendant's birth, which had been made by his deceased father in an action to which the plaintiff was not a party, was held inadmissible as evidence of the age of the defendant in support of his defence. HAINES *v.* GUTHRIE - C. A. 818

—— Admissibility—Bought and sold notes—Liability of brokers - - - 635
See PRINCIPAL AND AGENT. 2.

EVIDENCE—*continued.*

—— Bankruptcy—Bankrupt's admission of debt —How far binding on trustee - 720
See BANKRUPTCY. 30.

—— Infant—Necessaries - - - 410
See INFANT. 2.

—— Poor-rate—Diminution of income—Alteration of valuation list - - 364
See POOR-RATE. 3.

EXECUTOR—Judgment creditor—Bankruptcy
See BANKRUPTCY. 28. [479

FIXTURES—Bankruptcy—Disclaimer of leasehold interest - - - 738
See BANKRUPTCY. 14.

—— Landlord and tenant—Forfeiture on tenant "being bankrupt"—Right of removal
See BANKRUPTCY. 16. [454

FOREIGN JUDGMENT—Writ specially indorsed —Power to sign judgment under Order XIV. - - - - 302
See PRACTICE. 10.

FORGERY—Company—Share certificate issued by secretary—Principal and agent 103
See COMPANY. 2.

FRAUD — Company — Prospectus — Liability of promoters - - - - 562
See COMPANY. 3.

GAMING—*Betting—Employment of Agent to bet in his own Name—Implied Authority to pay Bet— When authority is irrevocable*—8 & 9 *Vict. c.* 109, *s.* 18.] The employment of an agent to make a bet in his own name on behalf of his principal may imply an authority to pay the bet if lost, and on the making of the bet that authority may become irrevocable. — So *held*, by Bowen and Fry, L.JJ., Brett, M.R., dissenting.—Judgment of Hawkins, J. (10 Q. B. D. 100) affirmed. READ *v.* ANDERSON - - - - C. A. 779

2. —— *Bicycle Grounds—Manager of — Betting there—Liability of Manager* (16 & 17 *Vict. c.* 119), *ss.* 1, 3.] The appellant was manager of bicycle grounds. Bicycle races, at which 20,000 spectators were present, took place there. Placards with the words "No betting allowed," were posted in the grounds, and twelve police constables were employed there by the manager, but some betting took place about twenty yards from the winning-post where he stood, acting as judge of the races. He was aware that betting would and did take place, but could not have wholly prevented it under the circumstances, although he might have repressed it to a certain extent with the aid of the constables:—*Held*, that as the business of the grounds was not that of illegal betting within 16 & 17 Vict. c. 119, s. 1, he was not liable to conviction under s. 3, as a "person having the care or management of or in any manner assisting in conducting the business of any . . . . place opened, kept, or used for the purposes aforesaid." THE QUEEN *v.* COOK - - - - 377

3. —— *Common Gaming House—Unlawful Gaming within* 17 & 18 *Vict. c.* 38, *s.* 4—"*Baccarat.*"] The 4th section of 17 & 18 Vict. c. 38, enacts that "any person, being the owner or occupier or having the use of any house, room, or place, who shall use the same for the purpose of

GAMING—*continued.*

unlawful gaming being carried on therein; and any person who, being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid; and every person having the care or management of or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid; and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place, may, on summary conviction thereof before any two justices of the peace, &c.," forfeit and pay a penalty not exceeding 500*l.*—A. was the proprietor of the Park Club, and was also occupier of the premises used by the club, and received the profits. B., C., D., and E. were members of the committee of management, whose duty it was to regulate the internal management of the club, and (amongst other things) to make bye-laws and regulations for the carrying it on and for the government of its members, who were elected by them. F., G., and H. were members of the club.—By the rules and regulations of the club, hazard was not to be played, dice were excluded, and the points at whist were limited to 1*l.*; all games were to be played for ready money; and under no pretence were strangers to be admitted in the card-room.—An entrance fee of 10 guineas and an annual subscription of 6 guineas was paid by each member of the club. The kitchen was conducted at a loss, and wines and cigars supplied at a slight excess over cost price. The profits accruing to the proprietor arose from the entrance-fees and subscriptions and what was called "card money." Members' cheques were cashed by the proprietor to the amount of 200*l.*, for which he charged 1 per cent.—The game of baccarat was played nightly, as follows,—About twelve persons at a time played at it. A special table was provided, with arrangements for the banker and players. Three packs of cards shuffled together were used. One card was dealt to each person, the banker included. The object of the game was to get 9 in pips or as near thereto as possible. After each had a card dealt to him and had seen it, it was at his option whether he would stand upon it or take another; and in the exercise of this option consisted the only semblance of skill in the game. If the banker had 9, and none of the others had, he swept the board: if he had not 9, but a less number, he won from all who were further from 9, and paid to all who were nearer to 9 than he was. The banker had a slight advantage, inasmuch as he had an extra "draw," and consequently with luck would win more quickly than an ordinary player.—Play commenced at 4.30 P.M., and continued till 7.30; commencing again at 10.30 P.M., and continuing till 3 and sometimes till 8 A.M. There was a fresh bank about every twenty minutes. A "regulation bank" was one held by any member who chose to take it by putting his name on a slate: it must not be less than 50*l.* Every third bank before 2 A.M. was a regulation bank. The other banks (which ordinarily ranged from 25*l.* to 300*l.*, but sometimes extended to 1000*l.* and even more,) were offered at auction. Each banker paid 1 per cent., and the punters (players) 5*s.* each, which

GAMING—*continued.*

was called "card money," up to 2 A.M.; after that hour 5*s.* an hour was charged until 5 A.M., when 1*l.* an hour was charged. The banker had to put down ready money to the amount of 300*l.*—Upon an information charging the eight persons above named with having committed offences against s. 4 of 17 & 18 Vict. c. 38, A., the proprietor, was adjudged to have been guilty of "keeping and using the Park Club for the purpose of unlawful gaming," and fined 500*l.* The four committeemen were adjudged to have been guilty, as persons "having the care or management of and assisting in conducting the business" of the house so kept and used for the purpose of unlawful gaming, and each fined 500*l.* The three players were also adjudged to have been guilty of the offence, as persons who "assisted by playing in conducting the business of the house so kept and used for the purpose of unlawful gaming," and were each fined 100*l.*:—*Held*, that the proprietor of the club and the four members of the committee were properly convicted: but that the players,—though possibly liable to be indicted for unlawful gaming in a common gaming-house,—were not liable to be summarily convicted under this statute. —*Per Hawkins, J.* If the house in question had been opened and used for a double purpose, viz., as an honest social club for those who did not desire to play, as well as for the purposes of gaming for those who did, it would not the less be a house opened and kept "for the purpose of gaming."—To constitute "unlawful gaming," it is not necessary that the games played shall be *unlawful* games: it is enough that the play is carried on in a "common gaming-house." The expression "*unlawful* games" was intended by the legislature to cover and include some games which, being lawful in themselves, were only made unlawful when played in particular places or by particular persons.—It makes no difference that the use of the house and the gaming therein is limited to the subscribers or members of the club, and that it is not open to *all* persons who might be desirous of using it. It is not a *public*, but a *common* gaming-house, that is prohibited.—"Baccarat" is a game of chance, and unlawful within 17 & 18 Vict. c. 38, s. 4.—Excessive gaming, per se, is not any longer a legal offence: it was not an offence at common law; and there now exists no statute against it. But the fact that it is habitually carried on in a house kept for the purpose of gaming is cogent evidence for a jury or other tribunal called upon to determine whether the house in which it is carried on is a common gaming-house, so as to make the keeper of it liable to be indicted for a nuisance at common law.—*Per Smith, J.* A "common gaming-house" is a house kept or used for playing therein at any game of chance, or any mixed game of chance and skill in which (1) a bank is kept by one or more of the players exclusively of the others, or (2) in which any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed or against whom the other players stake, play, or bet.—It is immaterial whether the bank is kept by the owner or occupier or keeper of the house or by one of the players. JENKS *v.* TURPIN - - - 505

GARNISHEE ORDER—Debt due to judgment debtor and another jointly - 535
See PRACTICE. 4.

GAS COMPANY—Bankruptcy of consumer—Distress for amount due—Preferential debt
See BANKRUPTCY. 12. [753

GENERAL AVERAGE—Expenses of reshipping cargo and of ship leaving port of refuge
Insurance (Marine) - - 69
See INSURANCE, MARINE.

HABEAS CORPUS—Custody of infant—Discretion - - - - - 614
See INFANT.

HIGHWAY—*Highway in Borough—Expenses of Maintenance—Contribution from County Authority—Highway Act*, 1862 (25 & 26 *Vict. c.* 61), *s.* 2—*Highways (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *ss.* 13, 38.] By the Highway Act, 1862 (25 & 26 Vict. c. 61), s. 2, defining the word "county," "for the purposes of this Act all liberties and franchises except boroughs . . . shall be considered as forming part of that county by which they are surrounded."—By the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 38, "in this Act 'county' has the same meaning as it has in the Highway Acts, 1862 and 1864," and by s. 13, any road which has between the 31st of December, 1870, and the date of the Act, ceased to be a turnpike road, ... shall be deemed to be a main road; and one half of the expenses incurred in the maintenance shall, as to every part therof which is within the limits of any highway area, be paid to the highway authority of such area "by the county authority of the county in which such road is situate" out of the county rate. A road in the borough and highway area of Over Darwen, in Lancashire, ceased to be a turnpike road in 1877:—*Held*, that, although for the purposes of the Highway Act, 1862, boroughs are not to be considered as forming parts of counties, yet, as the road was within the geographical limits of Lancashire, the county of Lancaster was the "county in which such road is situate" within 41 & 42 Vict. c. 27, s. 13, and the county authority was liable to pay half the expenses incurred in the maintenance of such road. MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF OVER DARWEN *v.* JUSTICES OF THE PEACE FOR THE COUNTY OF LANCASTER - 497

2. —— *Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 13—*Disturnpiked Road*—18 & 19 *Vict. c. c.*—*Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *ss.* 47, 49, 50, 51—*Expiration of Turnpike Trusts in* 1877—*Cesser of Turnpike Road—Main Road—Contribution from County for Repair.*] By a local Act (18 & 19 Vict. c. c.) incorporating the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), the maintenance of all highways within a district including a turnpike road became vested in commissioners. The trustees of the turnpike road thereupon ceased to repair it within the limits of the district. The turnpike trust expired in 1877. The commissioners were the "highway authority" for the district, which was a "highway area" within the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13:—*Held*, that, notwithstanding

HIGHWAY—*continued.*

the special legislation providing for the maintenance of the road by the commissioners, it only "ceased to be a turnpike road" within the meaning of s. 13 of the Highways and Locomotives (Amendment) Act, 1878, on the expiration of the turnpike trust between 1870 and the date of the passing of that Act, and therefore should be "deemed to be a main road," and one-half of the expenses of the maintenance of the part within the highway area should be paid to the highway authority by the county authority under s. 13. NEWTON IMPROVEMENT COMMISSIONERS *v.* JUSTICES OF LANCASHIRE - - - - 423

—— Stopping up and diverting—Expenses of urban authority — Solicitor — Local Government Acts - - - 640
See LOCAL GOVERNMENT ACTS.

HOTCHPOT—Advancement—Interest payable—Presumption of intention - - 246
See WILL.

HUSBAND AND WIFE—*Separate Estate—Fee Simple of Wife—Agreement for Separate Use signed by Husband only—Renunciation of Marital Rights by Husband—Will of Wife—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 7.] In order that the fee simple of an intended wife may be affected with a trust for her separate use by an agreement made between the intended husband and wife before marriage, the agreement must be in writing and signed by the wife as well as by the husband; if it is signed by the husband alone, it is, owing to the Statute of Frauds, s. 7, invalid as a declaration of trust for separate use as to the fee simple, a husband having in his wife's land only an estate for the joint lives of himself and his wife with a possible estate by the curtesy; and upon the death of the wife without issue during her husband's lifetime, her heir-at-law, and not her devisee, will be entitled to the land of which she is seised in fee simple.—Mere renunciation by an intended husband of his marital rights in his wife's real property is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee.—*Rippon* v. *Dawding* (Ambl. 565) commented on. DYE *v.* DYE
[C. A. 147

2. —— *Married Woman, Right of, to sue alone—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2—*Cause of Action before Act.*] A married woman may, by virtue of the Married Women's Property Act, 1882, sue alone for a tort committed before that Act came into operation. WELDON *v.* WINSLOW - C. A. 784

—— Judgment against married woman—Separate estate—Restraint on anticipation 691
See PRACTICE. 12.

INFANT — *Custody — Habeas Corpus*—36 & 37 *Vict. c.* 12, *s.* 1—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 10.] In the exercise of its discretion under 36 & 37 Vict. c. 12, s. 1, and s. 25, sub-s. 10 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the Court will look at all the surrounding circumstances before they will accede to the application of the father of a female child of tender years to remove her from the custody of the mother and other relations whose conduct

INFANT—*continued.*
with regard to the child is unimpeached, and place her under his control.—A mariner who had no fixed home, and who had already married a woman who left him and went to America more than seven years before and (as he said) died there, went through the ceremony of marriage with another woman at a registry-office at Portsmouth. Shortly after her marriage, the second wife, being informed by a stranger that she had received a letter from the first wife after the ceremony at the registry-office, quitted her supposed husband, and went to reside with her parents at Southampton where she gave birth to a female child. She afterwards took proceedings against her husband for bigamy: but, for want of proof that the first wife was living at the time of the second marriage, these became abortive.—The child having reached the age of nine, the father (without shewing any efforts to ascertain whether his first wife was living or not) applied to a judge at chambers for a habeas corpus to obtain its custody. The judge refused the application. The father appealed.—The Court,—not being satisfied that the second was a valid marriage, or that the father was in a position properly to maintain and educate the child:—*Held*, that the judge had wisely exercised his discretion, and dismissed the appeal, and also that the failure of the prosecution for bigamy was not entitled to any weight upon a motion of this kind. In re Ethel Brown [614

2. —— *Necessaries — Evidence.*] Where an infant is sued for the price of goods supplied to him on credit, he may, for the purpose of shewing that they were not necessaries, give evidence that, when the order was given, he was already sufficiently supplied with goods of a similar description, and it is immaterial whether the plaintiff did or did not know of the existing supply.—*Ryder* v. *Wombwell* (Law Rep. 3 Ex. 90) dissented from. Barnes & Co. *v.* Toye - 410

INN—Sale of intoxicating liquor to drunken person—Knowledge of condition of customer - - - - 207
See Licensing Acts.

INQUEST—Obstruction—Burning dead body 331
See Criminal Law. 2.

INSURANCE, MARINE—*General Average—Expenses of re-shipping Cargo and of Ship leaving Port of Refuge.*] A ship having during a voyage sprung a dangerous leak, the captain, for the safety of ship and cargo, put into a port of refuge to repair, where in order to repair the ship the cargo was necessarily landed:—*Held*, by Brett, M.R., and Bowen, L.J. (Baggallay, L.J., dissenting), that the expenses of reloading the cargo after the ship had been repaired and of pilotage and port charges on the ship leaving the port were not general average expenses.—*Atwood* v. *Sellar* (4 Q. B. D. 342; 5 Q. B. D. 286) distinguished. Svensden *v.* Wallace - C. A. 69

2. —— *Policy on Ship—Policy on Freight—Constructive Total Loss by Collision—Recovery of Damages from Owner of Ship in default—Claim by Underwriter on Ship after Payment of Sum insured to Compensation received for Loss of Freight—Subrogation.*] Freight to be earned under a

INSURANCE, MARINE—*continued.*
charterparty is not an incident to the ownership of the vessel; and therefore although an underwriter of a policy of insurance upon the vessel herself becomes, by abandonment to him upon a constructive total loss happening through the fault of another vessel, entitled after payment of the sum secured by the policy to every benefit accruing from the ownership of the insured vessel, he cannot claim any part of the damages recovered from the owners of the wrongdoing vessel on account of loss of freight intended to be earned by the insured vessel.—The defendants being owners of a ship chartered her upon a voyage, and insured her with the plaintiffs, and they insured the freight intended to be earned with other underwriters. The defendants' ship became a constructive total loss through a collision with the C. occasioned by negligence in navigating the latter vessel. The plaintiffs settled with the defendants for a total loss of the insured ship. No freight was earned under the charterparty. Afterwards the defendants recovered from the owners of the C. damages for the loss of their ship and of her freight:—*Held*, that the plaintiffs were not entitled to any part of the damages recovered from the owners of the C. on account of the loss of the freight intended to be earned by the defendants' ship. Sea Insurance Company *v.* Hadden [C. A. 706

INTERPLEADER—Appointment of receiver—Practice - - - - 67
See Practice. 7.

—— Indemnity to stockholder—Identity with claimant - - - - 632
See Practice. 6.

INTERROGATORIES—Deposit—Discretion of judge - - - - 326
See Practice. 8.

JOINT AND SEVERAL CONTRACT—Joint judgment against firm—Merger of several liability—Bankruptcy of firm—Proof against separate estate - - 50
See Bankruptcy. 31.

JUDGMENT—Bankruptcy—How far judgment against bankrupt binding on trustee 720
See Bankruptcy. 30.

—— Executor of judgment creditor—Bankruptcy notice - - - - 479
See Bankruptcy. 28.

JUDGMENT ORDER TO SIGN—Alimony pendente lite—Practice - - 855
See Practice. 9.

JUDGMENT SUMMONS—Appeal from Judge of High Court—Court of Appeal - 901
See Bankruptcy. 11.

JURISDICTION—Court of Bankruptcy—Conflicting claims between strangers to the bankruptcy - - - 238
See Bankruptcy. 35.

—— Court of Bankruptcy—Stay of proceedings in Chancery Division - - 235
See Bankruptcy. 18.

JUSTICES—*Case stated under* 20 & 21 *Vict. c.* 43, *and remitted for amendment, but not returned—Jurisdiction over Costs.*] A case having been stated by justices under 20 & 21 Vict. c. 43, and

JUSTICES—*continued.*
remitted to them for an amended statement, but not returned within the proper time, and therefore abandoned:—*Held*, that the Court still had jurisdiction to order the appellant to pay the respondent's costs. CROWTHER *v.* BOULT 680

—— Compensation under Lands Clauses Act—Order—Limitation of time - 586
See LANDS CLAUSES ACTS.

LANDLORD AND TENANT—*Covenant to pay "all Rates, Taxes, and Assessments"—Metropolis Local Management Acts*, 1855 *and* 1862 (18 & 19 *Vict. c.* 120, *s.* 105, *and* 25 & 26 *Vict. c.* 102, *s.* 96).] By an agreement of lease the tenant agreed to pay "all rates, taxes, and assessments payable in respect of the premises during the term":—*Held*, that a sum assessed upon the owners as their proportion of the expense of paving the street upon which the premises abutted, was not a rate, tax, or assessment within the meaning of the covenant, but a charge imposed upon the owner for the permanent improvement of his property. WILKINSON *v.* COLLYER 1

2. —— *Covenant for quiet Enjoyment.*] In order to constitute a breach of covenant for quiet enjoyment in a lease of land, it is sufficient that the lessee's ordinary and lawful enjoyment of the demised land be substantially interfered with by the acts of the lessor or those lawfully claiming under him, although neither the title to the land nor the possession of the land be otherwise affected.—By a general system of drainage made by the defendants in a particular district, various farms in that district were drained by several underground drains, by which the water was carried through all such farms. The defendants let one of these farms to the plaintiff with the usual covenant for quiet enjoyment against the acts of the lessors or any person lawfully claiming through or under them. The defendants had previously let another of such farms adjoining, but lying above the plaintiff's farm, to one C., with a right to use the drains through the plaintiff's land, so far as they were adequate to carry the water from C.'s farm. C. during the plaintiff's tenancy, first, by an excessive user of the drainage system, which was properly constructed for the purpose of drainage, caused the water passing down the drains in his farm to escape and overflow into the plaintiff's farm and damage his crops. Secondly, by a proper user by C. of the drains passing through the plaintiff's farm, damage was also done to a field in plaintiff's farm by the escape of water, but this arose from one of the drains there having been imperfectly and improperly constructed:—*Held*, that the defendants were liable to the plaintiff for a breach of their covenant for quiet enjoyment in respect of this last damage, as there had been within the meaning of such covenant a substantial interruption by a person who lawfully claimed through the defendants. But that the defendants were not liable for the damage done by the excessive user by C. of the drainage system, which was properly constructed, either under their covenant for quiet enjoyment or under the law of trespass or nuisance. SANDERSON *v.* MAYOR OF BERWICK-UPON-TWEED - - - - C. A. 547

LANDLORD AND TENANT—*continued.*

3. —— *Covenant by Lessor to pay Rates—"All rates chargeable in respect of the demised premises"—Water supplied to Tenant by Water Company—Water-rate.*] In a lease of a shop and basement and of three rooms on the third floor of the same house, the lessor covenanted to pay "all rates and taxes chargeable in respect of the demised premises." Water was separately supplied by a water company to the shop and basement, and paid for by the tenant. In an action to recover from the lessor the amount so paid:—*Held*, that such charge was a "rate" within the meaning of the covenant. DIRECT SPANISH TELEGRAPH CO. *v.* SHEPHERD - - - - - 202

4. —— *Lodgers' Goods Protection Act*, 1871 (34 & 35 *Vict. c.* 79), *ss.* 1, 2—"*Lodger*," *who is—Sleeping and Residence on Premises—Occupation for Business Purposes.*] The appellant occupied the first floor and basement of premises at a yearly rent, carrying on the business of a publisher there, but sleeping and residing elsewhere. He had no key of the outer door, which was under the control of his immediate landlord, who admitted him every morning:—*Held*, that the appellant was not a "lodger" within the meaning of s. 1 of the Lodgers' Goods Protection Act, 1871. HEAWOOD *v.* BONE - - - 179

—— Tenancy under mortgage deed—Attornment clause—Action to recover land—Judgment under Order XIV. - - 347
See PRACTICE. 11.

—— Bankruptcy—Disclaimer of leasehold interest - - - - - 684
See BANKRUPTCY. 13.

—— Bankruptcy—Disclaimer by trustee—Extension of time—Practice - - 466
See BANKRUPTCY. 15.

—— Bankruptcy—Leasehold interest of bankrupt—Disclaimer—Fixtures - 738
See BANKRUPTCY. 14.

—— Leasehold interest of bankrupt—Disclaimer by trustee—Leave of Court—Conditions
See BANKRUPTCY. 33. [731

—— Bankruptcy—Forfeiture on tenant "being bankrupt"—Removal of fixtures—Official receiver - - - 454
See BANKRUPTCY. 16.

LANDS CLAUSES ACTS—*Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 24—*Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 140—*Compensation—Settlement by Justices of the Amount—Limitation of Time*—11 & 12 *Vict. c.* 43, *s.* 11.] The determination by justices under s. 24 of the Lands Clauses Act, 1845, of the compensation to be paid by a railway company to a landowner for having in the construction of the railway injuriously affected his land, is not an order of the justices for the payment of money within s. 11 of 11 & 12 Vict. c. 43 (which limits the time for making a complaint to six months from the time when the matter of such complaint arose), and therefore the justices have jurisdiction under s. 24 of the Lands Clauses Act, 1885, to hear and determine the question of such disputed compensation, although the application be made more than

IANI S CLAUSES ACTS—*continued.*
six months after the land has been so injuriously affected.—*Re Edmundson* (17 Q. B. 67) overruled. THE QUEEN *v.* EDWARDS - - **C. A. 586**

LARCENY—Bailment of money - - **29**
See CRIMINAL LAW. 3.

LICENSING ACTS—*Intoxicating Liquor—Sale to Drunken Person—Knowledge of Condition of Customer—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 13.] The Licensing Act, 1872, s. 13, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. A publican sold intoxicating liquor to a drunken person who had given no indication of intoxication, and without being aware that the person so served was drunk:—*Held*, that the prohibition was absolute, and that knowledge of the condition of the person served with liquor was not necessary to constitute the offence. CUNDY *v.* LE COCQ - - - - - - - **207**

LIEN—Solicitor—Charging order - - **666**
See SOLICITOR. 2.

—— Solicitor—Proceeds of fi. fa.—Garnishee summons—Priority - - **543**
See SOLICITOR. 3.

LOCAL GOVERNMENT ACTS—*Highway — Expenses of stopping up or diverting—Right of Board to employ a Solicitor at the Cost of the Party—Highway Act*, 1835 (5 & 6 *Wm.* 4, *c.* 50), *ss.* 84, 85, 101—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 144, 189.] The charges of a solicitor employed by an urban authority to conduct proceedings at the instance of an individual for the stopping up or diverting a highway under ss. 84, 85 of the Highway Act, 5 & 6 Wm. 4, c. 50, are not "expenses" within s. 84 of the Act, so as to be recoverable in the manner pointed out by s. 101.—*Semble*, that all the steps required by s. 85 to be taken for the purpose of obtaining the order of sessions, are ministerial acts which ought to be done by the surveyor of the local authority. UNITED LAND COMPANY *v.* TOTTENHAM LOCAL BOARD - - - - - - **640**

2. —— *Rates—Local Board — Urban Authority—Highway Rate — Surveyors of Highways—Limit upon Amount of Highway Rate—Highway Act*, 1835 (5 & 6 *Wm.* 4, *c.* 50), *ss.* 5, 29—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 144, 216, 217.] The respondents were the local board for the district of G. Part of their district, called the outer district, was not rated for works of paving, water supply, and sewerage. The respondents under the Public Health Act, 1875, ss. 216, 217, made a highway rate of 3*s.* 4*d.* in the pound upon the inhabitants of the outer district, whose consent to the rate had not been obtained:—*Held*, that, although the local board were surveyors of highways within the outer district, pursuant to the Public Health Act, 1875, s. 144, yet the limit imposed upon rates made by surveyors of highways under the Highway Act, 1835, s. 29 (10*d.* in the pound for one rate and 2*s.* 6*d.* in the pound for one year) unless the consent of the parishioners had been obtained, did not apply to the highway rates made by a local board pursuant to the Public Health Act, 1875, ss. 216, 217, and that the rate of 3*s.* 4*d.* in the pound made by the respondents was valid. DYSON *v.* GREETLAND LOCAL BOARD **C. A. 946**

3. —— *Nuisance, Power of Justices to order specific Works for Abatement of—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94–96.] A privy openly discharged nightsoil and offensive matter on the bank of a river, the sanitary authority served the owner of the premises with a notice to abate the nuisance, and for that purpose "to remove the present pipes and pan, level the floor under the seat of the privy, and provide a galvanized double-handle pail under the seat, the cover of which said seat to be moveable, so that the premises should no longer be a nuisance or injurious to health." And the justices at sessions made an order in the terms of the notice:—*Held*, that they had jurisdiction to make the order.—*Ex parte Saunders* (11 Q. B. D. 191) followed; and *Ex parte Whitchurch* (6 Q. B. D. 545) distinguished or dissented from. THE QUEEN *v.* LLEWELLYN [**681**

4. —— *Road made good, and afterwards repaired—"Street"—Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *s.* 53.] In 1857 a local Act was passed incorporating certain parts of the Towns Improvement Clauses Act, 1847, including s. 53. At that time a country road ran past the land of the defendants. In 1874 the plaintiffs bought certain land of the defendants, and by agreement the road was widened and improved at the expense of the plantiffs. In 1880 the plaintiffs paved and flagged the footway by the side of the road, and sought to recover the expense of the work from the defendants as adjoining owners under the powers of the enactment above-mentioned:—*Held*, that the defendants were not liable for the expense of paving and flagging the footway.—Per Brett, M.R., and Bowen, L.J., on the ground that the work executed in 1880 was in the nature of repairs to the road.—Per Baggallay, L.J., on the ground that the road had been "theretofore" made good.—*Maude* v. *Baildon Local Board* (10 Q. B. D. 394) questioned. CORPORATION OF PORTSMOUTH *v.* SMITH - - - - - **C. A. 184**

5. —— *Water—Supply to House—Notice to Owner to obtain Proper Supply—Non-compliance with Notice—Power to charge Rates — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 62.] A local authority caused a supply of water to be brought in main water-pipes along the street in which a house was situate, and gave notice to the owner of the house, under c. 62 of the Public Health Act, 1875, to obtain a proper supply and do all such works as might be necessary for that purpose. That notice was not complied with, and the local authority did not exercise the power given to them by that section of executing the works necessary to connect the house with the main. In an action by the water company for water-rates:—*Held*, that the defendant was liable, and that it was not a condition precedent to such liability that the works necessary to bring the water into the house should have been executed. SOUTHEND WATERWORKS COMPANY *v.* HOWARD [**215**

LODGER—Occupation for business purposes—Parliament - - - - 179
See LANDLORD AND TENANT. 4.

MANDAMUS—*Practice—Pleading—Return of Unconditional Compliance—Plea traversing Return*—9 *Anne, c.* 20; 1 *Wm.* 4, *c.* 21; *Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 77; 46 & 47 *Vict. c.* 49, *s.* 3; *Order LIII., r.* 9; *Order LXVIII., r.* 1; *Order LXXII., r.* 2.] The repeal by 46 & 47 Vict. c. 49, of 9 Anne, c. 20 (in part), and 1 Wm. 4, c. 21, does not prevent the prosecutor from pleading to a return of unconditional compliance made to a writ of mandamus, inasmuch as the right of so pleading is part of the Crown practice, which is preserved by Order LXVIII., r. 1. and Order LXXII., r. 2. THE QUEEN *v.* JUSTICES OF PIREHILL - - 696

MARRIED WOMAN—Right to sue alone—Married Women's Property Act, 1882 784
See HUSBAND AND WIFE. 2.

MASTER—Reference as to validity of mortgage—Report how far conclusive - 807
See PRACTICE. 15.

MASTER AND SERVANT—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1 (1), *s.* 2 (1)—*Defect in condition of Plant—Plant unfit for Purpose for which it was used—Negligence of Employer.*] The Employers' Liability Act, 1880, which gives a workman a right of action against his employer for personal injury by reason of any defect in the condition of the plant used in the business of the employer, applies to a case where the plant is unfit for the purpose for which it is sued, though no part of it is shewn to be unsound. —Plaintiff, a workman in defendants' employment, was injured by reason of the breaking of a ladder, which was being used to support a scaffold. The ladder was insufficient for the purpose for which it was being used, and the scaffold and ladder had been placed and were being used under the directions of one of the defendants:—*Held* that, under the above circumstances, there was evidence that the plaintiff had been injured by reason of a defect in the condition of the plant, owing to the negligence of his employer, within the meaning of the Employers' Liability Act, 1880.—*Heske* v. *Samuelson* (12 Q. B. D. 30) approved and followed. CRIPPS *v.* JUDGE C. A. 583

2. —— *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—"*Journeyman*"—"*Labourer*"—"*Otherwise engaged in Manual Labour*"—*Omnibus Conductor.*] An omnibus conductor engaged at daily wages, paid daily, is not a "person to whom the Employers and Workmen Act, 1875, applies," and therefore is not entitled to the benefit of the Employers' Liability Act, 1880.—Judgment of the Queen's Bench Division (12 Q. B. D. 201) affirmed. MORGAN *v.* LONDON GENERAL OMNIBUS CO. - C. A. 832

3. —— *Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90)—*Definition of* "*Workman.*"] By an agreement in writing between H. & Co., manufacturers, and J.,— reciting that J. having a knowledge of mechanics, and H. & Co. requiring

MASTER AND SERVANT—*continued.*
the services of a person having such knowledge "to assist the firm as a practical working mechanic in developing ideas they the firm might wish to carry out, and to himself originate and carry out ideas and inventions suitable to the business of such firm if such inventions were approved by them,"—it was mutually agreed that J. should be employed by the firm "for the purpose above specified:"—*Held*, that J. was not "a mechanic or workman" within the Employers and Workmen Act, 1875. JACKSON *v.* HILL - - 618

—— Negligence—Unsafe premises—Ignorance of servant - - - - 259
See NEGLIGENCE.

METROPOLIS MANAGEMENT ACTS—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—"*General Line of Buildings*"—*Certificate of Superintending Architect, Effect of.*] In a proceeding before a magistrate under the Metropolis Management Amendment Act, 1862, s. 75, for erecting a building, without the consent of the Metropolitan Board of Works, beyond the general line of buildings in the street, the certificate of the superintending architect of that board is absolutely conclusive, and the magistrate is not entitled to judge for himself, whether the line fixed by the certificate be in fact the general line of buildings in the street.—So *held* by Bowen and Fry, L.JJ., Brett, M.R., dissenting. BOARD OF WORKS FOR PLUMSTEAD DISTRICT *v.* SPACKMAN - - - - - C. A. 878

2. —— *Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250—*Metropolis Local Management Acts Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—"*Owner*" *of Land—Land subject to Covenants—Expenses of paving New Street.*] By the Metropolis Local Management Act, 1855, s. 250, the word "owner" shall mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, or who would so receive the same if such lands or premises were let at a rack-rent; and by the Metropolis Local Management Acts Amendment Act, 1862, s. 77 (which is to be read as one with the Act of 1855) "owners" of land abutting on any new street are made liable to contribute towards the expenses of paving the same. The appellant, having a strip of land about 4 inches wide and 265 feet in length, abutting upon the north side of a new street, had erected a boundary fence upon the land along its whole extent, under a covenant to erect and for ever after maintain a fence thereon made with his vendor, who was owner of the land adjoining the strip on the north side:—*Held*, that the appellant was the "owner" of the strip of land within the meaning of s. 250 of the Metropolis Local Management Act, 1855, and therefore liable to contribute towards the expense of paving the new street. WILLIAMS *v.* WANDSWORTH BOARD OF WORKS - - - 211

3. —— *Telephone Company—Wire extending across Street—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 96—"*Street*"—*Property of Vestry or District Board in* "*Street*"—*Telegraph Act*, 1863 (26 & 27 *Vict. c.* 112), *ss.* 2, 3, 12—*Telegraph Act*, 1868 (31 & 32 *Vict. c.* 110), *s.* 2—

METROPOLIS MANAGEMENT ACTS—*contd.*
Telegraph Act, 1869 (32 & 33 *Vict. c.* 73), *ss.* 2, 3—"*The Company*"—"*Telegraph Company*"—*Consent of Local Authority—Trespass—Injunction.*] The Metropolis Management Act, 1855, does not by s. 96 confer upon a vestry or a board of works (constituted under that statute) such a property in the streets situate within their district, as to entitle them to maintain an action for an injunction against the erection of a telephone wire across a street, the telephone wire being erected at a great height and causing no appreciable danger to the public or to the traffic in the street.—*Coverdale* v. *Charlton* (4 Q. B. D. 104) followed.—Notwithstanding the Telegraph Act, 1869, s. 3, a telephone company registered under the Companies Act, 1862, and not incorporated under any special Act, does not fall within the phrase "the company" used in the Telegraph Act, 1863, and therefore is not forbidden by s. 12 of the last-named Act to erect its wires across a street, unless the consent of the body having the control of the street is obtained. Board of Works for Wandsworth District *v.* United Telephone Company - C. A. 904

—— Covenant to pay "rates, taxes and assessments" - - - - - 1
See Landlord and Tenant.

MISDESCRIPTION—Conditions of sale—Error discovered after execution of conveyance—Compensation - - - 351
See Vendor and Purchaser.

MORTGAGE—Attornment clause—Tenancy—Judgment under Order XIV. - 347
See Practice. 11.

—— Bankruptcy—Application by mortgagee for sale of security—Costs of trustee 228
See Bankruptcy. 19.

MUNICIPAL CORPORATION—*Election of Aldermen—Voting Paper, validity of—Insertion of Wrong Name—Signature—Ambiguity—Parol Evidence—Municipal Corporations Acts*, 1882 (45 & 46 *Vict. c.* 50), *s.* 60, *sub-s.* 4.] By the Municipal Corporations Act, 1882, s. 60, sub-s. 4, any person entitled to vote at an election of aldermen may vote "by signing and personally delivering at the meeting to the chairman, a voting paper containing the surnames and other names and places of abode and descriptions of the persons for whom he votes." A voting paper was delivered commencing, "I, the undersigned A. B.," and ending with the signature "C. D."; and upon a petition against the return of the persons elected, the commissioner received evidence shewing that the town clerk had inserted A. B.'s name in order that the voting paper might be used by him, but by inadvertence it was handed to C. D., who signed and personally delivered it to the chairman without discovering the mistake:—*Held*, that the vote was valid, and that the commissioner was right in receiving evidence of the circumstances under which it was given. Summers *v.* Moorhouse - - 388

NEGLIGENCE—*Master and Servant—Unsafe Premises—Knowledge of Master—Ignorance of Servant.*] In an action of negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew, but that the servant was ignorant of the danger.—Judgment of the Queen's Bench Division (12 Q. B. D. 493) affirmed. Griffiths *v.* London and St. Katharine Docks Company [C. A. 259

NOTICE—Bankruptcy—Application for order of discharge—Advertisement - 56
See Bankruptcy. 17.

—— Bankruptcy—Receiving order—Notice in name of partners - - - 113
See Bankruptcy. 26.

NUISANCE—Abatement—Power of justices to order specific works - - 681
See Local Government Acts. 3.

OFFICER—In army—Bankruptcy—Domicile 418
See Bankruptcy. 20.

OFFICIAL RECEIVER—Bankruptcy—Appearance on appeal—Costs - - 118
See Bankruptcy. 21.

PARTNER—Bankruptcy—Right of solvent partner to receive partnership assets - 113
See Bankruptcy. 26.

—— Partner in one firm the secret and sole principal in another firm—Bankruptcy of both firms—Proof by one firm against the other - - - - 43
See Bankruptcy. 32.

—— Realty forming part of partnership assets—Probate duty—Conversion - 275
See Revenue. 2.

PAYMENT INTO COURT—Pleading—Denial of liability—Rules of Supreme Court, 1875
See Practice. 13. [597

—— Denial of liability—Action for several breaches of contract—Acceptance in satisfaction of all demands—Costs - 897
See Practice. 14.

PEDIGREE—Declaration of deceased parent—Proof of birth - - - 818
See Evidence.

POOR LAW—*Derivative Settlement—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.] Under the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), an illegitimate child under sixteen does not take the settlement of its mother, where such settlement has been derived from the mother's father, but such child is remitted to its birth settlement. The Queen *v.* Guardians of Marylebone - - - - - C. A. 15

2. —— *Removal of Children—Settlement—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.] Where neither the father nor mother of a pauper child has acquired a settlement in his or her own right, and after the father has died the widowed mother has deserted such child, who is under the age of sixteen, and has not acquired a settlement for itself, such child is by 39 & 40 Vict.

POOR LAW—*continued.*

c. 61, s. 35, to be deemed to be settled in the parish in which it was born, and an order for its removal to a parish in which it was not born but in which its father was born was quashed, because, in that case, it could not be shewn what settlement such child derived from its father or mother without inquiring into the derivative settlement of such parent, which was prohibited by that section. GUARDIANS OF HEADINGTON UNION *v.* GUARDIANS OF ST. OLAVE'S UNION - - - C. A. 293

3. —— *Maintenance of Married Woman—Order upon Husband towards Cost of Relief—31 & 32 Vict. c. 122, s. 33.*] It is not a condition precedent to the power of justices under 31 & 32 Vict. c. 122, s. 33, to order the husband to pay for the maintenance of his pauper wife, that the guardians should have fixed the sum for her relief. Therefore, although the guardians have not fixed any sum for her future relief, but have given her a small weekly sum, the justices may, under the 33rd section order the husband to pay for her maintenance such weekly sum as, considering the condition of the husband and all the circumstances, may be proper, although it may exceed the amount of the relief previously given to her by the guardians.—Decision of the Queen's Bench Division (12 Q. B. D. 61) reversed. DINNING *v.* SOUTH SHIELDS UNION - - - - C. A. 25

4. —— *Poor-rates, Application of—Power to pay Roman Catholic Clergyman for Ministrations in Workhouse—Auditor—Disallowance.*] By a general order of the Poor Law Board, dated the 19th of August, 1867, it was provided that the guardians might employ such persons as they should deem requisite in or about the workhouse, or workhouse premises, or on the land occupied for the employment of the pauper inmates of the workhouse, or otherwise in or about the relief of the indoor poor, upon such terms and conditions as should appear to them to be suitable:—*Held*, that, under this order it was competent to the guardians to appoint and pay a Roman Catholic clergyman to minister to the religious wants of the Roman Catholic inmates of the workhouse. THE QUEEN *v.* HASLEHURST - - - - - 253

POOR-RATE — *Telephone Company — Rateable Occupation—"Wayleaves"—Overhead Wires and Apparatus attached to Roofs and Chimneys of Houses.*] A telephone company was possessed of an exchange by means of which subscribers could communicate by telephone with each other, and also of wires and telephonic apparatus unconnected with the exchange, for the use of persons renting them. For the purposes of this business they laid wires from their office to the business premises of their subscribers and also erected wires for the use of those who rented them. All these wires were overhead wires, and were carried from the office of the company to the different premises, being supported and steadied either by poles fixed in the ground or by being attached to the roofs, chimneys, or walls of some of the buildings over which they passed. The attachments were made in the case of a single wire by an iron spike driven into the building or by a bolt screwed into the ridge, or by an iron bracket nailed to the corner of the chimney to which the wire was attached, or in the case of a number of wires, by means of

POOR-RATE—*continued.*

standards or ridge saddles attached to the roofs of the buildings and fastened by iron bolts or stays. The consent of the owners or occupiers of the land or buildings was given by agreements in which the company undertook to pay an annual rent and to remove the wires and attachments upon a certain notice. The company had no key of the outside doors, and could only obtain access to the roofs by the permission of the occupiers:—*Held*, following *Electric Telegraph Company* v. *Overseers of Salford* (11 Ex. 181), that upon these facts there was proof of an occupation of land by the posts and wires of the company, and that they were rateable. LANCASHIRE TELEPHONE COMPANY *v.* OVERSEERS OF MANCHESTER - - 700

2. —— *Rateable Value—School Board—Public Elementary School—Elementary Education Act, 1870 (33 & 34 Vict. c. 75).*] A school board are rateable to the relief of the poor in respect of a public elementary school, whether they are owners or lessees of the site thereof. WEST BROMWICH SCHOOL BOARD *v.* OVERSEERS OF WEST BROMWICH [C. A. 929

3. —— *Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), ss. 36, 46, 47)—Supplemental Valuation List — Alteration during preceding twelve Months—Diminution of Income—Evidence—How rateable Value in Supplemental List to be ascertained.*] On an appeal from the assessment committee as to a supplemental valuation list under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), evidence of a falling off in receipts of tonnage rates on vessels coming to certain docks during the twelve months preceding the making of the supplemental list when the rates were the same, and which, as compared with former years, shews a continuous and not accidental falling off, is sufficient if not explained or rebutted to shew an alteration in the rateable value of the docks during that period within the meaning of s. 46.—When such alteration has been established, and it has therefore to be entered in a supplemental list, the rateable value of the docks is to be ascertained, not by opening up the previous quinquennial or supplemental list, but by assuming the value in the list then in force to be the correct value at the commencement of the twelve months preceding, and by deducting from it the diminution in value from the alteration during that period.—Decision of the Queen's Bench Division (11 Q. B. D. 721) reversed (Fry, J., dissenting). THE QUEEN *v.* POPLAR UNION - - C. A. 364

POUNDAGE—Sheriff's fees—"Costs of execution"—Bankruptcy - - - 415
See BANKRUPTCY. 34.

PRACTICE—*Appeal from County Court—County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6—Rules of Supreme Court, 1883, Orders XXXIX. and LII.*] An appeal from the decision of a county court judge should be by motion ex parte in the first instance under the County Courts Act, 1875, s. 6, and not by giving notice of motion under Order XXXIX., rule 3. *Shapcott* v. *Chappell* (12 Q. B. D. 58) questioned. MATHEWS *v.* OVEY - C. A. 403

2. —— *Attachment, Writ of, leave to Issue—Judge at Chambers, Jurisdiction of—Judicature Act, 1873, s. 39—Order XLIV., r. 2.*] A judge at

PRACTICE—*continued.*

chambers has power to give leave to issue a writ of attachment.—So held by Grove, J., and Huddleston, B., Day, J., dissenting. SALM KYRBURG *v.* POSNANSKI - - - - - **218**

3. —— *Attachment of Debts—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 61—*Order XLV.* (1883)—"*Debt, legal or equitable.*"] In July, 1882, the plaintiff obtained a judgment against W. for 574*l.* in an action for breach of promise of marriage commenced in August, 1881. In May, 1881, W. became entitled to a legacy of 500*l.* under a will of which the defendant was executor. This legacy was in hand and ready to be paid over in October, 1881. On the 31st of May, 1881, and before the legacy became actually payable to W., he married; and on the 17th of October, 1881, he by deed between himself of the one part and the defendant of the other part assigned the 500*l.* to the defendant upon trust to invest the money and pay the annual income to his wife for her separate use for life, and afterwards upon other trusts. On the 4th of January, 1883, the plaintiff obtained an order under s. 61 of the Common Law Procedure Act, 1854, attaching any sum or sums of money then in or which might come to the hands of the defendant, to answer the judgment recovered by her against W.—Upon an issue directed to try whether on the 4th of January, 1883, there was a sum of money which the plaintiff was entitled, under Order XLV. (1883), and under the Common Law Procedure Act, 1854, to attach in the hands of the defendant, to satisfy the plaintiff's judgment debt against W.:—*Held*, —by Williams. J., upon further consideration,—that, even assuming the settlement of October, 1881, to be impeachable, there was nothing in the nature of a debt, either legal or equitable, due or accruing due from the defendant to W. (the judgment-debtor) which could be attached to satisfy the judgment-debt. VYSE *v.* BROWN — **199**

4. —— *Attachment of Debts—Garnishee Order—Debt due to Judgment Debtor and Another jointly.*] The debt, legal or equitable, owing by a garnishee to a judgment debtor, which can be attached to answer the judgment debt, must be a debt due to such judgment debtor alone, and where it is only due to him jointly with another person it cannot be so attached. MACDONALD *v.* TACQUAH GOLD MINES COMPANY - - - **C. A. 535**

5. —— *Costs—Trial by Jury—Order LXV., r.* 1—*Jurisdiction of Judge to make Order as to Costs—"Good Cause"—Appeal—Action for Recovery of Land—Separate Issues—Taxation of Costs in such Action.*] Where an action is tried with a jury the judge before whom it is tried has no jurisdiction under Order LXV., rule 1, to make an order by which the costs will not follow the event unless there exist "good cause" within the meaning of that rule, and consequently there is an appeal with respect to the existence of the facts necessary to give the judge jurisdiction to make such order.—To be "good cause" within that rule there must be facts shewing that it would be more just not to allow the costs to follow the event, as, for example, oppression or misconduct of either of the parties by which costs have been unnecessarily increased.—The fact that the action is for the recovery of several

PRACTICE—*continued.*

closes of land, that the only defence is that the defendant is in possession, and that the verdict is for the plaintiff for some only of the closes claimed, does not by itself constitute "good cause" within Order LXV., rule 1, since the verdict in such a case is distributive, and the costs, if properly taxed, would be as on a finding by the jury on separate issues. JONES *v.* CURLING **C. A. 262**

6. —— *Interpleader—Indemnity to Stakeholder—Objection by Claimant indemnifying to Interpleader Issue—Order LVI., r.* 2 (6).] The objection that a stakeholder has, by merely taking an indemnity from one of two rival claimants to property in his hands, disentitled himself to relief under the Interpleader Acts because he has identified himself with and must be taken to "collude" with the claimant who gave the indemnity, cannot be raised by that claimant himself, and the decisions in *Tucker* v. *Morris* (1 Cr. & M. 73) and *Belcher* v. *Smith* (9 Bing. 82) do not apply. THOMPSON *v.* WRIGHT - - **632**

7. —— *Interpleader Issue—Sale—Receiver and Manager—Judicature Act*, 1873, *s.* 25, *sub-s.* 8, *Order LVII., rule* 15.] An interpleader issue being ordered to try the right to goods seized in execution, the Court or a judge may, under the Judicature Act, 1873, s. 25, sub-s. 8. and Order LVII., rule 15, order that, instead of a sale by the sheriff, a receiver and manager of the property be appointed. HOWELL *v.* DAWSON **67**

8. —— *Interrogatories—Deposit—Discretion of Judge—Rules of Supreme Court*, 1883, *Order XXXI., rr.* 25, 26.] A party to a cause is not entitled to obtain as a matter of right an order to administer interrogatories without making a deposit under Rules of the Supreme Court, Order XXXI., rules 25, 26, merely because the other party consents to it. The judge at chambers has upon an application of that kind a discretion, and in the exercise of that discretion may order the deposit to be made, notwithstanding that the party to be interrogated is ready to dispense with a deposit. ASTE *v.* STUMORE - - **C. A. 326**

9. —— *Order to sign Final Judgment—Order XIV., r.* 1—*Alimony pendente lite—"Debt or liquidated Demand.*"] An order to sign final judgment under Order XIV., r. 1, will not be made where the action is for arrears of alimony pendente lite, payable under an order of the Probate and Divorce Division. BAILEY *v.* BAILEY [**C. A. 855**

10. —— *Writ specially indorsed—Leave to enter Final Judgment—Foreign Judgment—Rules of the Supreme Court*, 1883, *Order III., r.* 6—*Order XIV.*] In an action upon a foreign judgment in which the writ of summons has been specially indorsed under Order XIV., the plaintiff may obtain an order empowering him to sign final judgment.—*Hodsoll* v. *Baxter* (E. B. & E. 884) followed. GRANT *v.* EASTON - - **C. A. 302**

11. —— *Action by Mortgagees against Mortgagor for possession of Land—Tenancy created by Deed of Mortgage—Special Indorsement of Writ—Order III., rule* 6 (*F*)—*Order XIV.*] The relationship of landlord and tenant may be created by a mortgage deed, and therefore, in an action for recovery of land by mortgagees from a mort-

PRACTICE—*continued.*

gagor in possession under a mortgage deed creating a tenancy between them, the writ may be specially indorsed under Order III., rule 6 (F), so that Order XIV. will apply, and final judgment may be ordered. DAUBUZ *v.* LAVINGTON [347

12. —— *Married Woman—Judgment against—Form of—Separate Estate—Restraint on Anticipation—45 & 46 Vict. c. 75, ss. 1, 19—Judicature Acts, Order XIV.*] An order giving leave to enter final judgment against a married woman in respect of her separate estate by virtue of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 19, should state that execution is to be limited to such separate estate as the defendant is not restrained from anticipating unless such restraint exists under any settlement or agreement for a settlement of her own property made or entered into by herself. BURSILL *v.* TANNER [691

13. —— *Payment into Court — Rules of Supreme Court*, 1875, *Order XXX. r. 1—Pleading—Payment into Court without admitting Liability.*] Where the defendant succeeds at the trial on an issue on money paid into court under Order XXX., r. 1, of the Rules of 1875, with a defence stating such payment as an alternative defence to the action, he is entitled to have judgment entered for him in the action.—In an action for trespass in breaking and entering the plaintiff's land, the defendants paid money into court under Order XXX., r. 1, of the Rules of 1875, and in their defence denied the plaintiff's possession of the land, and also stated that without admitting any kind of liability the sum paid into court was sufficient to satisfy any damage which the plaintiff might have sustained in consequence of any acts of theirs. The plaintiff joined issue upon these defences, but failed at the trial to establish any damages exceeding the sum paid into court, though he succeeded on the other issue. The Court of Appeal treated such defence of payment into court as an alternative payment, and as it went to the whole cause of action:—*Held*, reversing the decision of Williams, J., that the defendants were entitled to judgment. WHEELER *v.* UNITED TELEPHONE COMPANY - C. A. 597

14. —— *Payment into Court—Denial of Liability—Action for several Breaches of Contract—Payment into Court in respect of one Breach—Acceptance in satisfaction of all Demands—Costs—Order XXII., rr. 6, 7.*] In an action for breach of contract assigning two distinct breaches, the defendants pleaded denying the breaches, and alternatively paid money into court with regard to one of the breaches. The plaintiffs gave notice under Order XXII., rule 7, that they accepted the money paid into court in full satisfaction of the causes of action in the statement of claim:—*Held*, that the plaintiffs were entitled, without proceeding to judgment, to their costs of the action. M'ILWRAITH *v.* GREEN - - 897

15. —— *Receiver—Question of Title—Reference to Master—Appeal—Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7, *s.* 25, *sub-s.* 8.] The plaintiff, having obtained judgment, was by an order made at chambers appointed receiver of the rents of some houses

PRACTICE—*continued.*

belonging to the defendant; the order was made without prejudice to prior incumbrances. G. having applied to discharge the order appointing the receiver on the ground that he was a second mortgagee under a deed executed by the defendant before the judgment in the action, the Queen's Bench Division referred the question as to the validity of G.'s mortgage to a master, who after hearing evidence reported that the mortgage was a sham and had been executed in order to defeat the defendant's creditors. The Queen's Bench Division declined to review the evidence upon which the master had acted, accepted his report as conclusive, and refused G.'s application:—*Held*, that inasmuch as the receiver was appointed under an equitable jurisdiction now vested in the Queen's Bench Division, the evidence before the master might have been reviewed; and the Court of Appeal being of opinion on the evidence that the mortgage had been executed in good faith, discharged the order made at chambers, whereby the plaintiff was appointed receiver. WALMSLEY *v.* MUNDY [C. A. 807

16. —— *Third-Party Notice—Order XVI., r. 48—Indemnity—Order XI., r. 1 (g)—Service out of Jurisdiction.*] Where a defendant is not entitled to claim contribution against a person not a party to the action, he can only be entitled under Order XVI., rule 48, to issue a third-party notice to such person, where under a contract expressed or implied he is entitled to indemnity over against him.—Therefore, where the defendants were sued for damages to the plaintiffs' goods while on board a vessel of the defendants on a certain voyage, by reason of the vessel being not seaworthy for the voyage, it was held by the Court of Appeal that the defendants were not entitled to a third-party notice under Order XVI., rule 48, to the persons of whom the defendants had hired the vessel with a warranty that she was tight, staunch, strong, and fitted for the service.—By Order XI., rule 1, service out of the jurisdiction of a . . . notice of a writ of summons may be allowed by the Court or a judge whenever . . . (*g*) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction:—*Held* (by the Queen's Bench Division), that Order XI., rule 1 (*g*), does not apply to service out of the jurisdiction of a third-party notice on a third party domiciled or ordinarily resident in Scotland. SPELLER & CO. *v.* BRISTOL STEAM NAVIGATION CO. - - - - C. A. 96

17. —— *Transfer of Action to Chancery Division—Vendor and Purchaser—Action for Return of Deposit—Counter-claim for Specific Performance—Order XLIX., rr. 1, 3.*] In an action by purchaser of land against vendor for return of deposit the defendant counter-claimed specific performance:—*Held*, that the action ought to be transferred to the Chancery Division. LONDON LAND CO. *v.* HARRIS - - - - 540

—— Bankruptcy—Appeal from county court—Preliminary objection—Costs - 42
See BANKRUPTCY. 9.

PRACTICE—*continued.*

—— Case stated by justices — Remitted for amendment—Costs - - 630
See Justices.

—— Costs—Taxation—Solicitor—Defendant in person - - - - - 872
See Solicitor.

—— Costs, security for—Action remitted to county court - - - - 835
See County Court. 3.

—— Mandamus—Return of unconditional compliance—Plea to return - - 696
See Mandamus.

—— Married woman — Right to sue alone—Married Women's Property Act, 1882
See Husband and Wife. 2. [784

PRINCIPAL AND AGENT—*Agent's Liability—Broker signing as Principal—"Broker"—Sale of Goods—Arbitration—Award—Jurisdiction of Arbitrator—"Dispute arising on this Contract."*] By a contract in writing, the defendants "sold to" the plaintiffs a cargo of cotton seed cake of a specified quality. The contract contained a clause that "should any of the above goods turn out not equal to quality specified, they are to be taken at an allowance, which allowance together with any dispute arising on this contract is to be settled by arbitration." The defendants signed the contract with the addition of the word "brokers," and were acting as agents. Some time after the contract was signed, the defendants named their principals. The cargo proved to be of inferior quality, and an arbitration (which the plaintiffs did not attend) to determine the liability of the defendants was held; the arbitrators decided by their award that the defendants were not liable, inasmuch as a custom existed that a broker upon naming his principals ceased to be liable on the contract. At the trial of the action, the jury found that the alleged custom did not exist:—*Held*, first, that the defendants were personally liable on the contract: secondly, by Brett, M.R., and Bowen, L.J., Fry, L.J., dissenting, that the defendants were not relieved from liability by the award, inasmuch as the arbitrators had exceeded their jurisdiction. Hutcheson & Co. *v.* Eaton & Son - C. A. 861

2. —— *Sale by Brokers for Undisclosed Principal—Provision in bought and sold Notes for Settlement of Disputes by Brokers—Custom of Trade making Brokers personally liable—Evidence of—Admissibility.*] A written contract made by brokers on behalf of undisclosed principals for the sale of hides provided that "if any difference or dispute shall arise under this contract it is hereby mutually agreed between the sellers and buyers that the same shall be settled by the selling brokers, whose decision in writing shall be final and binding on both sellers and buyers."—In an action against the brokers in respect of inferior hides delivered under the contract, the buyers made a claim for the breach against the brokers as principals by custom of the trade:—*Held*, that evidence of a custom of the trade that a broker who does not disclose his principal is personally responsible for the performance of the contract and liable for the breach was rightly rejected, as such custom was inconsistent with the arbitration

PRINCIPAL AND AGENT—*continued.*

clause, which would, if the custom were incorporated, make the brokers judges in their own cause. Barrow *v.* Dyster - - - 635

—— Company—Share certificate issued by secretary - - - - - - 103
See Company. 2.

PROOF—Bankruptcy — Inquiry into consideration - - - - - - 720
See Bankruptcy. 30.

—— Bankruptcy—Joint and separate estate 50
See Bankruptcy. 31.

PROBATE DUTY—Realty forming part of partnership assets - - - 275
See Revenue. 2.

PROSPECTUS— Fraud— Company— Liability of promoters - - - - - - 562
See Company. 3.

RAILWAY COMPANY—*Carrier—Unequal Tolls—Group Rates—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 90—*Undue Preference — Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 2, 6—*Action for Breach of Railway and Canal Traffic Act, whether maintainable.*] Sect. 90 of the Railways Clauses Consolidation Act, 1845, provides that the tolls charged by railway companies for the carriage of goods shall be charged equally to all persons and after the same rates in respect of all goods of the same description "passing only over the same portion of the line of railway," and that no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular person using the railway.—A railway company carried coals to a point upon their railway from a group of collieries placed along the line at varying distances from that point, and charged tolls at one rate per ton in respect of such carriage to all the members of the group. In an action for overcharges by the owner of the colliery lying nearest to the point of carriage:—*Held*, that the company had committed a breach of the provisions of s. 90, which section applied notwithstanding that the termini of the transit over the company's line from the group to the point of carriage differed with respect to each colliery, and therefore that the company were liable in the action.—An action will not lie in respect of a breach of the provisions of s. 2 of the Railway and Canal Traffic Act, 1854. Manchester and Sheffield Railway Co. *v.* Denaby Main Colliery Co. - - - - - 674

2. —— *Dock Company—Railway ancillary to Docks—"Company"—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 3, 4.] The protection against seizure in execution afforded by the Railway Companies Act, 1867, ss. 3, 4, applies to the railway plant of every company constituted by a statute for the purpose of constructing or working a railway, even although the railway is merely a subordinate and ancillary part of the undertaking authorized by the statute.—By two local statutes a company was authorized to construct a wet dock, a lock forming an entrance to the dock, and two short railways, each about half a mile long, to connect the dock with other railways. The plaintiffs had lent money to the company

RAILWAY COMPANY—*continued.*
upon mortgage-debentures. The defendants were creditors of the company, and having obtained judgment seized in execution certain railway plant belonging to it. The plaintiffs having brought an action for an injunction to prevent the defendants from realizing their execution:—*Held*, that the dock company was a "company" within the Railway Companies Act, 1867, s. 3, and that the railway plant belonging to it was protected from seizure by s. 4. GREAT NORTHERN RAILWAY CO. *v.* TAHOURDIN - - - - C. A. 320

RECEIVER—Interpleader—Practice - - 67
See PRACTICE. 7.

—— Question of title—Reference to Master—Report how far conclusive - - 807
See PRACTICE. 15.

RECEIVING ORDER—Power to refuse—Bankruptcy—"Sufficient cause"—Execution of creditor's deed - - - 118
See BANKRUPTCY. 21.

—— Power to rescind—Court of Bankruptcy
See BANKRUPTCY. 22. [244

RENT—Gas company—Money due from consumer — How far preferential debt — Bankruptcy - - - - 753
See BANKRUPTCY. 12.

RETURN—Mandamus—Pleading - - - 696
See MANDAMUS.

REVENUE—*Income Tax—Burial Board—Application of Surplus Income in aid of Poor-rate—"Profit"—5 & 6 Vict. c. 35, s. 60; 15 & 16 Vict. c. 85, s. 22.*] A burial board was constituted under 15 & 16 Vict. c. 85, and in pursuance of the Act a burial ground was provided with money charged upon the poor-rate of the parish, and the surplus over expenditure of the income derived from the fees charged by the board was regularly applied in aid of the poor-rate:—*Held*, that the board were liable to be assessed to the income tax in respect of such surplus, inasmuch as the provision requiring it to be applied in aid of the poor-rate did not prevent it from being a "profit" within 5 & 6 Vict. c. 35, s. 60. PADDINGTON BURIAL BOARD *v.* COMMISSIONERS OF INLAND REVENUE - - - - - 9

2. —— *Probate Duty—Realty forming part of Partnership Assets—Conversion.*] The shares of partners in realty forming part of the partnership property must be regarded as personal estate in the absence of any binding agreement between the partners to the contrary; and probate duty is payable on a deceased partner's share in such realty irrespective of the question whether or not there is in the event any actual conversion into personalty.—*Custance* v. *Bradshaw* (4 Hare, 315) discussed.—Judgment of Queen's Bench Division (10 Q. B. D. 488) affirmed. ATTORNEY-GENERAL *v.* HUBBUCK - - - - - C. A. 275

RULES OF SUPREME COURT, 1875, Order XXX., r. 1 - - - - - 597
See PRACTICE. 13.

—— **Order III., r. 6 (f)** - - 302, 347
See PRACTICE. 10, 11.

—— **Order XI., r. 1 (g)** - - - 96
See PRACTICE. 16.

RULES OF SUPREME COURT, 1875—*continued.*
—— **Order XIV.** - - - 302, 347
See PRACTICE. 10, 11.

—— —— - - - - 691
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—— —— **r. 1** - - - - 855
See PRACTICE. 9.

—— **Order XVI., r. 48** - - - 96
See PRACTICE. 16.

—— **Order XXII., rr. 6, 7** - - - 897
See PRACTICE. 14.

—— **Order XXXI., rr. 25, 26** - - 326
See PRACTICE. 8.

—— **Order XXXIX.** - - - 403
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—— **Order XLII., r. 23** - - - 479
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—— **Order XLIV., r. 2** - - - 218
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—— **Order XLV.** - - - - 199
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—— **Order XLIX., rr. 1, 3** - - - 540
See PRACTICE. 17.

—— **Order LII.** - - - - 403
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—— **Order LIII., r. 9** - - - 696
See MANDAMUS.

—— **Order LVI., r. 2 (6)** - - - 632
See PRACTICE. 6.

—— **Order LVII., r. 15** - - - 67
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—— **Order LXVIII., r. 1** - - - 696
See MANDAMUS.

—— **Order LXXII., r. 2** - - - 696
See MANDAMUS.

SALE OF GOODS—Sale note—Broker signing as principal—Liability - - - 861
See PRINCIPAL AND AGENT.

SCHOOL BOARD—Non-attendance at school—By-laws - - - - - - 176
See ELEMENTARY EDUCATION.

—— Home lessons — Unlawful detention of scholar - - - - 225
See ELEMENTARY EDUCATION. 2.

—— Poor-rate—Rateability - - - 929
See POOR-RATE. 2.

SECURITY—Creditor—Valuation—Bankruptcy
See BANKRUPTCY. 25. [128

SEPARATE ESTATE—Will of wife—Statute of Frauds - - - - 147
See HUSBAND AND WIFE.

SERVICE — Out of jurisdiction — Third-party notice - - - - - 96
See PRACTICE. 16.

SETTLEMENT—Poor law - - 15, 293
See POOR LAW.

SHERIFF—Poundage—Costs of execution 415
See BANKRUPTCY. 34.

SHIP—*Statutory Duty, Action for Breach of—Ship and Shipping—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 172—*Refusal to give Certificate of Discharge to Seaman—Penalty.*] An action will not lie for the refusal to give to a sea-

SHIP—*continued.*
man the certificate of discharge directed to be given by the 172nd section of the Merchant Shipping Act, 1854, the only remedy for such refusal being the penalty provided by that section. Vallance *v.* Falle - - - - 109

2. —— *General Average—Towage—Contract to tow Ship in Distress for limited Time—Remuneration payable whether or not Ship and Cargo saved.*] A contract for the towage during a limited time of a laden ship in distress, entered into by her master for the common benefit of the adventure, may, if the ship and her cargo are ultimately saved by the towage, give rise to a general average contribution, even although the remuneration agreed upon in the contract for the towage is thereby made payable by the shipowner, whether or not the ship and her cargo are ultimately saved. Ocean Steamship Co. *v.* Anderson - - - - - - C. A. 651

3. —— *Charterparty—Cesser Clause—Bill of Lading—Incorporation of Conditions of Charterparty in Bill of Lading.*] A charterparty contained stipulations in the usual form for payment of freight and demurrage, and also a stipulation that "as this charterparty is entered into by the charterers on account of another party, their liability ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage." The charterers having placed the cargo on board at the port of loading, a bill of lading was signed whereby the goods were made deliverable to themselves at the port of discharge, "they paying freight, and all other conditions as per charterparty." In an action by the shipowner against them, as consignees of the cargo, for demurrage in respect of delay at the port of discharge:—*Held*, that the cesser clause in the charterparty must be rejected as inapplicable in reading the bill of lading which incorporated all the conditions of the charterparty applicable to the reception of the goods at the port of discharge, and therefore that the plaintiff was entitled to maintain the action.—Judgment of the Queen's Bench Division (11 Q. B. D. 186) affirmed. Gullischen *v.* Stewart Brothers - C. A. 317

4. —— *Liability for Freight—Indorsee of Bill of Lading—"Passing of Property" in Goods shipped—Indorsement by way of Pledge—Bills of Lading Act* (18 & 19 *Vict. c.* 111), *s.* 1.] The shipper of goods, by simply indorsing the bill of lading and delivering it to the indorsee by way of security for money advanced by him, passes the property in the goods to the indorsee, so as to make him directly liable to the shipowner for freight under 18 & 19 Vict. c. 111, s. 1.—So *held* by Brett, M.R., and Baggallay, L.J., Bowen, L.J., dissenting.—The shipper of goods indorsed the bill of lading in blank and delivered it to the defendants by way of security for money advanced by them. The goods upon their arrival at the port of destination were sold for an amount insufficient to pay the freight:—*Held* (by Brett, M.R., and Baggallay, L.J., Bowen, L.J., dissenting), that the property in the goods had passed to the defendants within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), s. 1, so as to make them liable in an action by the shipowner for freight.—Judgment of Field, J. (10 Q. B. D. 363), reversed. Burdick *v.* Sewell C. A. 159

—— Insurance (Marine) — Collision — Constructive total loss—Recovery of damages—Subrogation - - - 706
See Insurance, Marine. 2.

SOLICITOR—*Defendant in Person—Costs as Solicitor—Taxation.*] Where an action is brought against a solicitor who defends it in person and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary.—Judgment of the Queen's Bench Division (12 Q. B. D. 452) affirmed. The London Scottish Benefit Society *v.* Chorley, Crawford and Chester C. A. 872

2. —— *Lien—Charging Order—Money paid into Court of Bankruptcy by Plaintiff—Application by Plaintiff's Solicitor*—23 & 24 *Vict. c.* 127, *s.* 28.] An action having been brought to recover a sum of 727*l.*, C., one of the defendants, counterclaimed against the plaintiff for the sum of 700*l.* C. presented also a petition in bankruptcy against the plaintiff, who was ordered to bring into court a sum of 300*l.* The action and the proceedings in bankruptcy ultimately were referred to an arbitrator, who, by his award, found that the plaintiff was entitled to judgment in the action for 157*l.*, that no debt was due from the plaintiff to C., and that the sum of 300*l.* must be paid to the plaintiff out of the Court of Bankruptcy. The plaintiff's solicitors having applied to the Queen's Bench Division for a charging order on the sum of 300*l.* for their costs in the action:—*Held*, that they were not entitled to an order. Pierson *v.* Knutsford's Estates Co. C. A. 666

3. —— *Lien—Charging Order*—23 & 24 *Vict. c.* 127, *s.* 28—*Garnishee Summons—Priority.*] The proceeds of a fi. fa. issued on behalf of the successful plaintiff in an action were attached in the hands of the sheriff by a garnishee summons from a county court to answer a judgment obtained against the plaintiff in that court. The plaintiff's solicitor in the action, who had received notice of the service of the garnishee summons, subsequently obtained an order under 23 & 24 Vict. c. 127, s. 28, charging the fund recovered with costs of the action remaining due to him:—*Held*, that such order was rightly made, and the solicitor's claim was entitled to priority over the claim of the judgment creditor of the plaintiff under the garnishee summons. Dallow *v.* Garrold - - - - - 543

—— Lien—Proceeds of fi. fa.—Garnishee summons—Priority - - - 543
See Solicitor. 3.

—— Petitioning creditor—Payment to client with notice of act of bankruptcy - 747
See Bankruptcy. 2.

SPECIFIC PERFORMANCE — Counter-claim — Action to recover deposit—Transfer to Chancery Division - - - 540
See Practice. 17.

STATUTES:
29 Car. 2, c. 3, s. 7 - - - 147
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9 Anne, c. 20 - - - - 696
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1 Will. 4, c. 21 - - - - 696
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2 & 3 Wm. 4, c. 71, ss. 2, 4, 5, 6 - - 304
See Easement.

3 & 4 Wm. 4, c. 15, ss. 1, 2 - - 843
See Copyright.

5 & 6 Wm. 4, c. 50, ss. 84, 85, 101 - 640
See Local Government Acts.

5 & 6 Vict. c. 35, s. 60 - - - 9
See Revenue.

8 & 9 Vict. c. 18, s. 24 - - - 586
See Lands Clauses Acts.

8 & 9 Vict. c. 20, ss. 6, 140 - - 586
See Lands Clauses Acts.

—— —— s. 90 - - - - 674
See Railway.

8 & 9 Vict. c. 109, s. 18 - - - 779
See Gaming.

10 & 11 Vict. c. 34, ss. 47, 49, 50, 51 - 623
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11 & 12 Vict. c. 43, s. 11 - - - 586
See Lands Clauses Acts.

12 & 13 Vict. c. 106, s. 165 - - 727
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15 & 16 Vict. c. 85, s. 22 - - - 9
See Revenue.

16 & 17 Vict. c. 119, ss. 1, 3 - - 377
See Gaming. 2.

17 & 18 Vict. c. 31, ss. 2, 6 - - 674
See Railway.

17 & 18 Vict. c. 104, s. 172 - - 109
See Ship.

17 & 18 Vict. c. 125, s. 15 - - 688
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See Mandamus.

18 & 19 Vict. c. c. - - - - 623
See Highway. 2.

18 & 19 Vict. c. 111, s. 1 - - - 159
See Ship. 4.

18 & 19 Vict. c. 120, s. 96 - - 904
See Metropolis Management Acts. 3.

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20 & 21 Vict. c. 43 - - - - 680
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23 & 24 Vict. c. 127, s. 28 - - 543
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25 & 26 Vict. c. 61, s. 2 - - - 497
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See Metropolis Management Acts.

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—— —— s. 96 - - - - 1
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26 & 27 Vict. c. 112, ss. 2, 3, 12 - - 904
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30 & 31 Vict. c. 127, ss. 3, 4 - - 320
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30 & 31 Vict. c. 142, s. 10 - - 835
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32 & 33 Vict. c. 51, s. 2 - - - 142
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32 & 33 Vict. c. 62, s. 5 - - - 901
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32 & 33 Vict. c. 67, ss. 36, 46, 47 - 364
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32 & 33 Vict. c. 71, ss. 21, 48, 78 - 56
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32 & 33 Vict. c. 73, ss. 2, 3 - - 904
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33 & 34 Vict. c. 75, s. 74 - - 176, 225
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—— —— - - - - - 929
See Poor-rate. 2.

34 & 35 Vict. c. 79, s. 1, 2 - - 179
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certain property belonging to the defendant described in the particulars of sale as producing a net annual rental of 39*l.*, and one of the conditions of sale was, "if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale but compensation shall be allowed by the vendor or purchaser as the case may require." After the conveyance (without any covenants) had been executed by the defendant to the plaintiff, it was discovered by the plaintiff that the rental of 39*l.* was a gross rental, the net rental being considerably less:—*Held*, that, notwithstanding the error was not discovered until after the conveyance, the plaintiff was entitled to compensation under the conditions of sale.—*Cann* v. *Cann* (3 Sim. 447) and *Bos* v. *Helsham* (Law Rep. 2 Ex. 72) followed.—*Manson* v. *Thacker* (7 Ch. D. 620), *Besley* v. *Besley* (9 Ch. D. 103), and *Allen* v. *Richardson* (13 Ch. D. 524) dissented from. Palmer *v.* Johnson - - C. A. 351

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WATERCOURSE—*Right to Protection against Flood — Adjoining Landowners — Liability for sending Water on adjoining Lands.*] By reason of an unprecedented rainfall a quantity of water was accumulated against one of the sides of the defendant's railway embankment, to such an extent as to endanger the embankment, when in order to protect their embankment, the defendants cut trenches in it by which the water flowed through, and went ultimately on to the land of the plaintiff, which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater extent that it would have done had the trenches not been cut. In an action for damages for such injury the jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently:—*Held*, that though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and that they were therefore liable. Whalley *v.* Lancashire and Yorkshire Railway Company C. A. 131

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LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

OL 7/9/62